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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1941~~ 1942

No. ~~1083~~ 60

C. J. HENDRY COMPANY AND FRANK SEMATOVICH, PETITIONERS,

vs.

E. C. MOORE, I. ZELLERBACH AND A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED MARCH 30, 1942.

CERTIORARI GRANTED APRIL 13, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1083

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. 1]

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

LB C 7558

E. C. Moore, I. Zellerbach, A. T. Jergins, as the Fish and Game Commission of the State of California, Petitioners,

vs.

Purse Seine Net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent

Petition—Filed June 24, 1936

To the Honorable the Superior Court of the State of California, in and for the County of Los Angeles:

Your petitioners respectfully represent:

That the above mentioned E. C. Moore, I. Zellerbach, A. T. Jergins, are the duly appointed, qualified and acting Fish and Game Commissioners of the State of California, and constitute the Fish and Game Commission of said State;

That said purse seine net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, the respondent herein, is and was at all times herein mentioned an appliance used for the taking and catching of fish;

That heretofore, to-wit: on the 18th day of June, 1936, in the waters of the State of California, in said County of Los Angeles, to-wit: District 20, and within three miles [fols. 2-5] of the Catalina Island shore line Fish and Game District 20, said purse seine net, the respondent herein, was then and there used and maintained wilfully and unlawfully by Jack Borich and other parties unknown to your petitioner, contrary to the provisions of the existing statutes and laws of the State of California for the protection of fish, as follows, to-wit: In violation of the provisions of section 842 of the Fish and Game Code of the State of California.

That your petitioners herein, acting by and through L. G. Smith, a duly appointed, qualified and acting Assist-

ant County Fire and Game Warden of the County of Los Angeles, State of California, and a duly appointed, qualified and acting Volunteer Fish and Game protector of the Division of Fish and Game, Department of Natural Resources, did then and there seize and take said respondent, and said L. G. Smith has ever since kept and now has the same in his possession and under his control. That said L. G. Smith did thereupon forthwith report such seizure to your petitioners herein. That said respondent was at all times herein mentioned and now is a public nuisance.

Wherefore, Your petitioners pray for a judgment of this Court adjudging said respondent a public nuisance, and forfeiting the same and ordering the destruction or sale of the whole or any part thereof.

U. S. Webb, Attorney General of the State of California; Paul D. McCormick, Deputy Attorney General, Attorneys for Petitioners.

(Verified.)

[fol. 6] In Superior Court of Los Angeles County

[Title omitted]

Order for Hearing—Filed June 24, 1936

The verified petition of E. C. Moore, I. Zellerbach, A. T. Jergins, as the Fish and Game Commission of the State of California, having been filed in this Court on the ~~22nd~~ 24th day of ~~July~~ June, 1936, alleging that the respondent above named was seized by and upon the authorization of said petitioners while used and maintained in the waters of said County of Los Angeles, and of the State of California, wilfully and unlawfully and in violation of the existing statutes and laws of the State of California for the protection of fish; and praying for a judgment of this court, declaring said respondent to be a public nuisance, and forfeiting the same and ordering the destruction or sale of the whole or any part thereof:

Now, therefore, Wednesday, the 22nd day of July, 1936, in Dept. L. B. "A" at 10 o'clock A. M., of said day, and/~~the court robin~~ of the Superior Court of the State of California, in and for

City of Long Beach

[fol. 7] the County of Los Angeles, in the ~~County of Los Angeles, State of California,~~ are hereby fixed as the time and place for the hearing of said petition.

Dated June 24th, 1936.

L. E. Lampton, Co. Clerk, by Henry O. Minton, Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. (Seal.)

[File endorsement omitted.]

[fol. 8] In Superior Court of Los Angeles County

[Title omitted]

Notice of Hearing—Filed June 24, 1936

Notice is hereby given, That on Wednesday, the 24th day of June, 1936, E. C. Moore, I. Zellerbach, A. T. Jergins, as the Fish and Game Commission of the State of California, filed a verified petition in the Superior Court of the State of California, in and for the County of Los Angeles, directed to said Court, the substance of which petition was and is, that on the 18th day of June, 1936, in the waters of the State of California, in said County of Los Angeles, to-wit: Pacific Ocean within three miles of the Catalina Island shore line, Fish and Game District No. 20, said purse seine net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, the respondent herein, was then and there used and maintained wilfully and unlawfully by Jack Borich and other parties unknown to your petitioner, contrary to the provisions of the existing statutes and laws of the State of California for the protec-[fol. 9] tion of fish, as follows, to-wit: In violation of the provisions of section 842 of the Fish and Game Code of the State of California.

That said respondent was and is a public nuisance and the judgment of the Court is asked declaring said respondent a public nuisance, and forfeiting the same, and ordering the destruction or sale thereof.

And all persons will take notice that Wednesday, the 22nd day of July, 1936, at ten o'clock a. m. of said day, and the court room of the Superior Court of the State of California,

Long Beach L. B. A. in and for the County of Los Angeles, in the said County of Los Angeles, State of California, have been fixed as the time and place for the hearing of said petition.

Dated: June 24th, 1936.

L. E. Lampton, Co. Clerk, by Henry O. Minton, Clerk of the Superior Court of the State of California, in and for the County of Los Angeles. (Seal.)

[File endorsement omitted.]

[fol. 10] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

AFFIDAVIT OF POSTING NOTICE—Filed July 22, 1936

STATE OF CALIFORNIA,
County of Los Angeles, ss:

John Alley, being first duly sworn, deposes and says:

That he is a person over the age of 18 years and not a party to the within action; that he posted true copies of the Petition, Order for Hearing and Notice of Hearing in the within action in the City of Long Beach, County of Los Angeles, in three conspicuous places, to-wit:

County Clerk's Office, Jergins Trust Building;
City Hall, Long Beach;
Pine Avenue entrance, first floor, Jergins Trust Building,
on the 24th day of June, 1936.

John Alley.

Subscribed and sworn to before me this 20th day of July, 1936. Kathryn Buckman, Notary Public in and for said County and State. (Seal.)

[fol. 11] [File endorsement omitted.]

[fol. 12] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

CLAIM—Filed July 22, 1936

Now appear C. J. Hendry Company, a corporation, and Frank Sematovich by C. J. Hendry Company, a corporation,

intervening for the interest of themselves as owners of the said respondent purse seine net, and make claim to the said purse seine net as the same is held by the Fish and Game Commission of the State of California, petitioners in the above entitled cause, pursuant to proceedings under Section 845 of the Fish and Game Code of the State of California; and that the said claimants were at the time of the filing of the petition herein, and still are, the true and bona fide owners of the said net.

[fol. 13] Wherefore, they pray to defend accordingly.

C. J. Hendry Company. By Wm. J. Maggio.
Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants

(Verified.)

[fol. 14] Received copy of the within Claim this 22 day of July, 1936. U. S. Webb, Atty. Gen. Paul D. McCormick, Deputy Atty. Gen. Attorney for ——.

[File endorsement omitted.]

[fol. 15] In Superior Court of Los Angeles County

[Title omitted]

Demurrer of Claimants—Filed July 22, 1936

Claimants above named demur to the petition herein upon the following grounds:

1. That the petition fails to state facts sufficient to constitute a cause of action.

2. That the petition fails to state facts sufficient to constitute a ground of forfeiture of the respondent net.

3. That the petition fails to state facts sufficient to constitute a cause of action within the jurisdiction of this court.

4. That the court has no jurisdiction of the respondent net or of the subject of this action.

Wherefore, the claimants pray that the respondent net be delivered to them and that they go hence with their [fol. 16] costs.

Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants.

The foregoing Demurrer is filed in good faith and in the opinion of the undersigned is well taken.

Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants.

Authorities

C. C. P. Sec. 430, Subd. 16, Fish & Game Code, Sec. 842.845.

Received copy of the within Demurrer this 22 day of July, 1936. U. S. Webb, Atty. Gen. Paul D. McCormick, Deputy Atty. Gen. Attorney for ——.

[File endorsement omitted.]

[fol. 17] In Superior Court of Los Angeles County

[Title omitted]

Answer of Claimants—Filed July 22, 1936

Come now the claimants, C. J. Hendry Company, a corporation, and Frank Sematovich, and in answer to the petition herein, admit, deny, and allege as follows:

I

Deny, generally and specifically, each and every allegation of the petition herein, and allege that the said net in the petition mentioned did not, nor did any part thereof, become forfeited in the manner and form as in the petition in that behalf alleged.

Wherefore, the claimants pray that the respondent net be delivered to them and that they go hence with their costs.

Sawyer & Cluff and Arch E. Ekdale. By Arch E. Ekdale, Attorneys for Claimants.

[fol. 18]. (Verified.)

[fol. 19] Received copy of the within Answer this 22 day of July, 1936. U. S. Webb, Atty. Gen. Paul D. McCormick, Deputy Atty. Attorney for ——.

[File endorsement omitted.]

[fol. 20] In Superior Court of Los Angeles County

No. L. B. C. 7558

E. C. Moore, I. Zellerbach, A. T. Jerdens, as the Fish and Game Commission of the State of California, Petitioners,

vs.

Purse Seine Net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent,

C. J. Hendry Company, a corporation, and Frank Sematovich, *Claimants*

Opinion—August 17, 1936

On the question of fact raised in this proceeding, I am forced to the conclusion that the net in question was actually used in Fish and Game District 20 in violation of the Fish and Game Code.

After studying the very complete and able briefs filed by claimant, and the cases cited, I am of the opinion that the remedy provided in section 845 of the Fish and Game Code of the state, is not within the exclusive jurisdiction of the Admiralty Court of the United States, and that it is not a void exercise of the legislative power of the State of California.

[fol. 21] The authority of the state to make laws regulating and protecting fish within the jurisdictional limits of the state is not questioned, but it is seriously and ably contended that the remedy for enforcing forfeiture of the net used in violation of such police law is within the exclusive jurisdiction of the United States. I cannot agree with such contention.

I cannot see anything more involved here than the right of the state to enforce a violation of its laws by a civil action *in rem*, provided by the legislature. The mere fact that the forfeiture sought to be enforced is directed against an object which might be made the subject of the maritime and admiralty jurisdiction does not make a statutory cause of action to enforce the provision of the state law, a proceeding in admiralty.

A proceeding *in rem*, and this is clearly that, is not within the exclusive jurisdiction of the admiralty courts, even though in some particulars the machinery used is identical.

Such a remedy did not originate with the admiralty courts, but was adopted from the civil law. It is not a remedy afforded by the common law, but when used to enforce a right not maritime in its nature it is a remedy given by statute. (*The Moses Taylor*, 71 U. S. 411, 431; *The Hine v. Trevor*, 71 U. S. 555, 567.) In my opinion the case of *Smith v. Maryland*, 59 U. S. 71, cited by petitioners is ap-

[fol. 22] plicable and binding here. The laws of Maryland cited there created a remedy against the boat itself, if it was used in violation of the law, and the forfeiture of the boat, under such remedy was held not to conflict with the admiralty jurisdiction of the United States.

I see no merit in the other points raised by claimant. In view of the foregoing, judgment will be given as prayed. Attorney for petitioners will prepare findings.

Dated: August 17, 1936.

Harry R. Archbald, Judge.

[fol. 23] In Superior Court of Los Angeles County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed August 26, 1936

The above entitled cause came on regularly for hearing the 22nd day of July, 1936, in Department B of the above entitled court, the Honorable Harry R. Archbald, Judge presiding; U. S. Webb, Attorney General of the State of California, by Paul D. McCormick, Deputy Attorney General, appearing as attorneys for petitioners, and Sawyer & Cluff and Arch E. Ekdale appearing as attorneys for claimants; and evidence both oral and documentary having been introduced, and the cause having been submitted for decision, the court now makes its Findings of Fact as follows, to-wit:

[fol. 24] I

That E. C. Moore, I. Zellerbach, and A. T. Jergins are the duly appointed, qualified, and acting Fish and Game

Commissioners of the State of California and constitute the Fish and Game Commission of said State.

II

That respondent herein is a purse seine net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches.

III

That on the 18th day of June, 1936, in the waters of the State of California in the County of Los Angeles, and within Fish and Game District #20, and within one-half mile of the Catalina Island shoreline, respondent purse seine net was then and there used, maintained, and operated in catching and taking fish by a certain Jack Borich and other unknown persons; that at said time and said place said net contained approximately two tons of tuna fish.

IV

That while respondent purse seine net was being used, maintained and operated in catching and taking fish as aforesaid, L. G. Smith, the duly appointed, qualified, and acting volunteer Fish and Game Protector of the Division of Fish and Game, Department of Natural Resources of the State of California, did then and there seize and keep said respondent and did thereafter report said seizure to [fol. 25] petitioners herein.

And as Conclusions of Law from the foregoing facts, the court finds:

I

That the use of said purse seine net in taking and catching fish in Fish and Game District #20 was unlawful.

II

That respondent purse seine net is a public nuisance.

III

That said respondent purse seine net should be forfeited to the Fish and Game Commission of the State of California.

IV

That after said forfeiture, said respondent purse seine net should be sold or destroyed by the Fish and Game Commission of the State of California.

Dated: August 26th, 1936.

Harry R. Archbald, Judge of the Superior Court.

(Affidavit of service.)

[fol. 26] [File endorsement omitted.]

[fol. 27] In Superior Court of Los Angeles County

LB C 7558

E. C. Moore, I. Zellerbach, A. T. Jerdins, as the Fish and Game Commission of the State of California, Petitioners,

vs.

Purse Seine Net, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent

C. J. Hendry Company, a Corporation, et al., Claimants

Judgment—Filed August 26, 1936

The above entitled cause came on regularly for hearing on the 22nd day of July, 1936, before the Honorable Harry R. Archbald, Judge presiding; U. S. Webb, Attorney General of the State of California, by Paul D. McCormick, Deputy Attorney General, appearing as attorneys for petitioners, and Sawyer & Cluff and Arch E. Ekdale appearing as attorneys for claimants; and evidence both oral and documentary having been introduced, and the cause having been submitted for decision, the court having heretofore caused to be made and filed herein its written Findings of Fact and Conclusions of Law, and being fully advised,

Wherefore, by reason of the law and the Findings of Fact aforesaid,

[fol. 28] It Is Ordered, Adjudged And Decreed that respondent purse seine net, approximate length 325 fathoms,

approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, is a public nuisance; and

It Is Further Ordered that said respondent purse seine net be forfeited to the Fish and Game Commission of the State of California and said Fish and Game Commission of the State of California is hereby ordered to sell or to destroy said purse seine net.

Dated: August 26th, 1936.

Harry R. Archbald, Judge of the Superior Court.

O. K. J. T.

(Affidavit of service.)

[fols. 29-30] [File endorsement omitted.]

Entered Aug. 29, 1936. Docketed Aug. 29, 1936. Book 945, Page 328. By I. Bottomley, Deputy.

[fol. 31] In Superior Court of Los Angeles County

[Title omitted]

Notice of Appeal—Filed November 27, 1936

To the Clerk of the above entitled Court; to the Petitioners herein, and to U. S. Webb, Esq., Attorney General, and Paul D. McCormick, Esq., Deputy Attorney General, Attorneys for said Petitioners:

Each of you is hereby notified that the claimants above named, C. J. Hendry Company and Frank Sematovich, do hereby appeal to the District Court of Appeals of the State of California, for the Second District, from the judgment of the above entitled Superior Court, made on August 26, 1936, and entered on August 29, 1936, in Book 945 of Judgments, at Page 328, and from the whole of said judgment.

[fols. 32-38] Dated: November 27, 1936.

Sawyer & Cluff, Alfred T. Cluff, Arch E. Ekdale, Attorneys for said Claimants.

Received copy of the within Notice of Appeal this 27 day Nov., 1936.

U. S. Webb, by Paul D. McCormick, Deputy, per R. G., Attorneys for Petitioners.

[File endorsement omitted.]

[fol. 39] IN SUPERIOR COURT OF LOS ANGELES COUNTY

Department LB-B

Hon. Harry R. Archbald, Judge

No. LB C-7558

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners,

vs.

PURSE SEINE NET, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, Respondent

Statement of Evidence

Long Beach, California,
July 22, 1936.

The above entitled cause came on regularly for trial in Department B of the above Superior Court, the Honorable Harry R. Archbald, Judge presiding; the Petitioners being represented by Paul D. McCormick, for U. S. Webb, State Attorney General; the Respondent being represented by Arch E. Ekdale and Alfred T. Cluff. Thereupon the following proceedings were had and the following testimony adduced:

[fol. 40] L. G. SMITH, called as a witness on behalf of petitioners, being first duly sworn, testified as follows:

Direct examination.

By Mr. McCormick:

Q. What is your business or occupation?

A. I am assistant Fish and Game Warden of the County of Los Angeles, and also work for the State as a voluntary deputy.

Q. You are ex-officio Game Warden of the Division of Fish and Game of the State of California?

A. Yes.

Q. Where are you located with reference to your employment?

A. My headquarters are at Avalon, Catalina.

Q. Calling your attention to on or about June 18th, 1936, did you have occasion on that date to take into your possession a purse seine net?

A. Yes.

Q. Will you explain to the Court just what you were doing on that occasion?

Mr. Ekdale: To which we object, no foundation laid, too general, vague, no opportunity to object to the questions.

(No ruling.)

Mr. McCormick: Calling your attention to June 18th, 1936 were you patrolling in the course of your duties on that date?

[fol. 41] Q. What time of the day or night were you engaged in such occupation?

A. That particular day we were out from early in the morning up until about noon and then I went home and took a little sleep, and went out again at three o'clock and worked from three o'clock on the 18th until late on the evening of the 19th.

Q. You mean early on the morning of the 19th?

Mr. Ekdale: Object to that.

Mr. McCormick: Withdraw the question. On this occasion that you were out in the course of your employment, did you board a boat?

A. Yes.

Q. What was the name of the boat?

A. Purse Seine Boat Reliance.

Q. Did you at that time ascertain the name of the Captain?

A. Yes.

Q. What was it?

A. Jack Borich.

Q. Were there other members of the crew on the boat at the time you boarded it?

A. Yes.

Q. How many?

A. I believe there were nine besides the captain.

Q. When you boarded the boat where was it located with [fol. 42] reference to Catalina Island?

A. It was lying a little less than half a mile offshore, from the westerly end of Empire Landing, that is on the land side of Catalina Island.

Q. With reference to Avalon, where was that?

A. It is northwesterly, on the same side of the island.

Q. Did you take any measurement or do anything to ascertain the exact position of the boat at the time you boarded it?

A. Yes, sir.

Q. Just what did you do?

A. I took a compass bearing from the location, or just this side of the location to Ship Rock, which was 286 degrees, and then I looked southeasterly, and saw that the boat was lying inside of the line from Ship Rock to Twin Rock.

Q. Where was that with reference to Avalon?

A. Southwesterly, along the same side of the island.

Q. By the way, was there anyone with you?

A. Yes, sir.

Q. Who was that?

A. Page, the boat engineer.

Q. The boat that you were on on that occasion, is that a County boat?

A. Yes, sir.

Q. Used by you during the course of your duties?

A. Yes, sir.

[fol. 43] Q. Did you on that occasion that you boarded the boat Reliance see a net?

A. Yes.

Q. In connection with the boat?

A. Yes.

Q. Was that net in the water?

A. A portion of it was. They had retrieved probably half of the net, and the other, approximately, half of it, was still in the water.

Q. Was there anything in the portion of the net which was in the water?

A. There were fish.

Q. What kind of fish?

A. Blue Fin Tuna.

Q. What did you do after you boarded the boat and saw this portion of the net in the water?

A. I located the captain and told him that he was violating——

Q. Just a minute.

Mr. Ekdale: I object to any conversation . . .

Mr. McCormick: Well, it is not important. Tell what you did, but don't give any conversation with Captain Borich or any of the other members of the crew.

A. I placed the captain and members of the crew under arrest, and told them to retrieve the net and take the fish out, and accompanied the boat back to Avalon and filed a complaint.

[fol. 44] Q. When the net was retrieved into the boat, were there any fish in it?

A. Yes, sir.

Q. Approximately how many pounds or tons?

Mr. Ekdale: Objected to as wholly immaterial.

Mr. McCormick: Certainly is not immaterial. It is our contention that we have a right to show it was being used for taking fish.

Mr. Ekdale: That does not go to that point, your Honor.

Mr. McCormick: Obviously, it does.

Mr. Ekdale: May I address the Court? The point is this: the mere fact that there were fish in the net does not indicate where they were taken, nor how, and the amount would not throw any light on whether there was a violation of the section.

The Court: I will overrule the objection. It might have quite some bearing [redacted] the case.

A. There was a little less than two tons of fish, blue fin tuna.

Mr. McCormick: You say that you took the boat to Avalon?

A. Yes, sir.

Q. And there at that time the net was still on the boat?

A. Yes, sir.

Q. And you took the net into custody as the County Game Warden, and ex-officio State Game Warden?

Mr. Ekdale: Object to that as leading and suggestive.

[fol. 45] The Court: Sustained.

Mr. McCormick: After you arrived at Catalina, was the net still on board the boat?

A. Yes.

Q. Did you do anything with reference to the net thereafter?

A. Yes, I put an evidence tag on the net, and after the trial——

Q. I don't care about the trial. Just talking about the net.

A. Then we convoyed the ship back to San Pedro and late on the afternoon of the 19th turned the net over to the Division of Fish and Game.

Q. You say you turned over the net to the Division of Fish and Game, at San Pedro?

A. Yes.

Q. Anyone in particular?

A. Captain Groat was in charge and I made out the condemnation papers and he took charge of the net after that.

Q. Will you tell us the approximate dimensions of this net?

A. I never measured it. The captain told me it was 325 fathoms long——

Q. Just from your own personal knowledge.

Mr. Ekdale: May the answer as far as given be stricken out?

[fol. 46] The Court: Stricken out.

A. A little over 300 fathoms long, and approximately, 40 in depth.

Q. What mesh?

A. The mesh, I did not measure it, but from looking at it I imagine it was about seven to eight.

Q. And it was a purse seine net?

A. Yes, sir.

Q. Did you take any bearings or any other measurements other than you have testified with reference to the location of the boat and the location of the net at the time you first boarded the Reliance?

A. No more than just looking toward Shore and seeing that it was just off of the cliff between The Quarry and Empire landing to get the exact position along the shore.

Q. Did you arrive at any opinion as to the approximate distance of the boat from the shore line?

Mr. Ekdale: To which we object, no foundation laid. Calling for the conclusion of the witness.

Mr. McCormick: I think he can give his opinion. It is a matter of common knowledge that a person can testify to the speed of an automobile and he certainly can testify to the approximate distance.

The Court: Overruled.

A. I took the bearing to Ship Rock, and determined that they were inside of the line from Ship Rock to Twin Rock, [fol. 47] and by placing a straight edge on the chart it showed that it could not be over half a mile from shore.

Q. Have you had experience in matters of that kind?

A. Yes.

Q. What has that been?

A. Well, we used that method of determining the location of every boat suspected of fishing in the closed area. We have used that method for approximately seven years.

Q. How long have you been engaged in this occupation of yours?

A. Almost eight years.

Q. And you have taken bearings with reference to the distance of a boat from the shore line?

A. Yes.

Q. And its relative position with reference to adjoining waters?

A. Yes.

Q. Could you state how many such measurements you have taken?

A. Oh, a hundred, a hundred and fifty, or more.

Mr. McCormick: That is all.

[fol. 48] Cross examination.

By Mr. Ekdale:

Q. Mr. Smith, do you recall the home port of the boat you approached?

Mr. McCormick: Object to that as immaterial.

Mr. Ekdale: For the purpose of identification. It is painted on the stern of the vessel; compelled to be there by law.

Mr. McCormick: I cannot see where that is material here.

The Court: I can see how it might have something to do with the observation of the witness, credibility of the witness. Overruled.

A. I don't remember the exact home port, but it was not San Pedro.

Mr. Ekdale: Don't you recall it being on the stern, RELIANCE, and underneath the home port?

A. Yes, but I have seen so many—Tacoma—Seattle——

Q. There are several ships by the name RELIANCE, possibly the same size as this vessel.

Mr. McCormick: Incompetent, irrelevant and immaterial. No bearing on the issues of the case.

Mr. Ekdale: Cross examination. Goes to the credibility of the witness.

The Court: It goes further than that. I think I will sustain the objection.

Mr. Ekdale: Can you tell us the size of this vessel?

[fol. 49] A. Never measured it.

Q. In your opinion?

A. About 70 feet.

Q. Beam?

A. Probably 12 or 13.

Q. Draft?

A. Possibly eight or nine feet.

Q. What hour of the night or day was it on the 18th when you first saw the vessel?

A. It was about eleven forty-one or forty-two in the evening. If was eleven forty-five when I boarded the vessel, and I had seen it a few minutes before that.

Q. Had you seen it prior to eleven forty-one?

A. I say, I can't give it as being eleven forty-one exactly. It was a few minutes before eleven forty-five.

Q. Was it dark?

A. Quite dark. Starlight.

Q. Lots of breeze?

A. No breeze.

Q. Any current along that shore?

A. There was none that night.

Q. What means did you take to check that?

A. I could see the cliff.

Q. How do you know from looking at the cliff whether or not there was a current?

A. If there was a current the vessel would drift.

[fol. 50] Q. You saw the boat at about what time?

A. I boarded it at eleven forty-five, and could see the cliff directly astern of the vessel.

Q. Other than that, you made no check of it?

A. No, sir.

Q. Had you made any check earlier in the evening?

A. Check of what?

Q. Of the tide or current?

A. No.

Q. Do you recall what the tide was on that night?

A. No.

Q. Do you know when ebb or low tide was?

A. No.

Q. Didn't you check that at any time during the evening?

A. No.

Q. Do you know how long it takes to purse in a net, and bring it aboard with two tons of fish in it, assuming no difficulties in doing it?

Mr. McCormick: Objected to as immaterial.

The Court: Overruled.

A. Probably an hour and a half.

Mr. Ekdale: Does it ever take less than that to purse in a net, and bring it aboard?

A. I have seen it done in an hour and a half.

Q. Isn't it a matter of several hours?

A. I don't think that is the ordinary length of time, [fol. 51] because there is a variation, with the fish in the net. The more fish, the longer it takes to haul in the net.

Q. Will a vessel drift faster or slower with the net in the water?

A. I can't say as to that. I can't say as to that. I don't think it would have any effect.

Q. Don't you know that a net of the size that you have described has a cork and lead line on it?

A. Yes.

Q. About a thousand pounds of lead on it?

A. I don't know how much. I would say probably a ton and a half of lead.

Q. And with a net some 300 fathoms long, aren't you prepared to say as a man of the sea, whether that net in the water would retard or speed up the drift of the vessel?

A. I can't see that it would have any effect if there were no surface conditions.

Q. You have had some experience in manning vessels?

A. Yes.

Q. Do you know whether a deep keeled vessel will drift faster than a shallow?

A. The deep keel would drift faster.

Q. Do you think it would make no difference, if there was a heavy net fastened to the vessel, that it would make no difference in the drift of the vessel?

A. Depends on the wind. If you have no wind, it cer-
[fol. 52] tainly would not have much effect on the drift of the vessel.

Q. The wind itself would decide entirely whether there was any drift?

A. The wind will drift the vessel, if there is any wind.

Q. Ever read the Pacific Coast Pilot?

A. Parts of it.

Q. You keep a manual on board ship?

A. At times.

Q. Did you ever read the table of currents relating to the Pacific coast?

Mr. McCormick: Objected to as immaterial. That type of question obviously calls for the conclusion of the witness.

The Court: What is the contention?

Mr. Ekdale: I contend that there is no proof so far where these fish were caught, and I am trying to show by this man what a net will do in the water——

The Court: Well, I think it would have some bearing in that respect. Overruled.

Mr. Ekdale: Did you see any of these fish caught?

A. No.

Q. Can you get a fish in or out of the net other than by taking them in or out like the fish get in ordinarily?

A. They can't get in.

Q. They can get out?

A. Not except there is a hole in the net.

Q. Did you see the net at the time it was pursed?

[fol. 53] A. No.

Q. You don't know where it was pursed, nor when?

A. No. I have my idea.

Q. But did you see it?

A. No.

Q. Then you don't know of your own knowledge where the net was pursed, nor when?

A. No.

Q. There are quite extensive currents along this island?

A. At times.

Q. And they apparently are without prediction as to which way they run or where they run?

Mr. McCormick: Objected to as immaterial.

The Court: I will overrule the objection.

The Witness: The question is not clear.

Mr. Ekdale: I will reframe it. You say you are not familiar with the Pacific Coast Pilot published by the United States Government?

A. Not entirely.

Q. You have not read the paragraph on currents?

A. No.

Q. But you have been around here for several years?

A. Yes.

Q. And making arrests for fish and game violations for four or five years?

A. Yes.

[fol. 54] Q. And you have been familiar with those waters for some period of time?

A. Yes.

Q. But you have never read the section or paragraph on currents, in the Pacific Coast Pilot?

A. No.

Q. Would you say it was a fair statement that there is an estimated velocity of three quarters of a knot prevailing along that line?

Mr. McCormick: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. McCormick: Stipulated that the same objection may be deemed to be made to all questions concerning currents and drift?

The Court: Yes.

Mr. Ekdale: Would you say that that was a fair statement that there is a prevailing current of about three-quarters of a knot along this area of the coast?

A. In what direction?

Q. South, southeast.

A. No, I would not say there is a prevailing current. The current changes in a few minutes.

Q. Irrespective of the wind?

A. Yes.

Q. Changes with the tide?

[fol. 55] A. Well, just a minute. I would not say it would change with the tide. I have seen it change during the same tide.

Q. And at times there will be eddy currents which carry any floating objects in or out at an unpredictable rate, irrespective of wind velocity, or these general conditions?

A. I would say parallel to the shore. I would not say in or out. In some cases, a little bit.

Q. Haven't there been lots of vessels wrecked along that coast, for that reason, that the current carries the vessel in?

A. I can't say.

Q. Isn't it true that during foggy or thick weather, that the currents are still there, and isn't it true that the same conditions prevail when it is flat calm?

A. I have never noticed it in foggy weather, but I have noticed it in calm weather.

Q. Isn't it true that early in the morning along this section of Catalina Island, or at night, when there is no prevailing westerly breeze, that a light or floating object starting three or four miles out will tend to follow right straight up the coast to Long Point?

A. You have various currents.

Q. Isn't that the usual situation that it will carry it in and up?

A. No, I don't think that is the usual situation. I have [fol. 56] seen them go one way as many times as the other.

Q. But the current tends to carry them in more often than out?

A. I could not say about that. I don't know.

Q. Were you aboard the vessel Reliance when it came from Avalón to San Pedro?

A. No, sir.

Q. Did you take the net off of the vessel Reliance?

A. No, sir.

Q. As far as you know it has always been on the Reliance?

A. Yes. I have not seen the net since I turned it over to the Fish & Game Commission.

Q. At that time the net was still aboard the vessel?

A. Yes.

Q. And the vessel was in command of its captain?

A. No, I don't think the captain was there, or any of the crew.

Q. You took the vessel and let the crew go ashore?

A. *I* did not.

Q. Weren't you aboard?

A. Not at the time I turned it over to the Commission. They had left.

Q. They brought it back to San Pedro, 26 miles, and they were in charge of the vessel at all times during that trip, and they had the net aboard?

A. Yes, sir.

[fol. 57] A. Do you know whether it is a fact that after the vessel was brought back, and tied up to the wharf, whether two or three or four or five days elapsed before the net was taken off the vessel?

A. I don't know.

Mr. McCormick: Objected to as immaterial.

The Court: He says he don't know, anyway.

Mr. Ekdale: You say that the first time you saw the vessel Reliance, was probably ten minutes or so before you boarded it?

A. That night.

Q. And that was approximate eleven forty-one to five p. m., on June 18th?

A. Yes.

Q. And at that time the vessel was where?

A. It was directly offshore from the cliff, from the westerly end of Empire Landing, approximately half a mile from shore.

Q. How did the compass bear?

A. 286.

Q. Did you take any other bearing?

A. No.

Q. Did you swing the needle to a second point?

A. No, I did not need that. I took the bearing astern, and it was directly offshore from the cliff.

Q. What cliff?

[fol. 58] A. Between The Quarry and Empire Landing.

Q. Are you telling me that the cliff is directly in line with Ship Rock?

A. No, I said it was directly offshore from the cliff.

Q. And you took a compass bearing——

A. From the location to Ship Rock.

Q. You were guessing at the angle toward the cliff?

A. Yes, but I was directly offshore, and the front of the vessel was on the line from Twin to Ship Rocks.

Q. Then the compass bearing was the same to Twin Rock as to Ship Rock?

A. Yes.

Q. What was it?

A. 180 degrees.

Q. Did you take it by compass?

A. It would not be necessary.

Q. Explain your answer.

A. If I am on a direct line from one point to another, midway between the two points, if I am directly in line, the line only has one bearing.

Q. A straight line between the two points?

A. Yes.

Q. How far were you from the Reliance?

A. Probably 20 feet.

Q. But you did not take any bearings after that?

A. No instrument bearings.

[fol. 59] Q. And you have no way of knowing how far you were from Ship or Twin Rocks?

A. No.

Q. But there is a varying distance between that line as drawn from the two points, to the shore, as you progress along the shore?

A. It is not over half a mile at any point as I remember it.

Q. There are other objects shown on the chart which you could have taken compass bearings to?

A. Not at that time, no, sir.

Q. There were none?

A. No, sir.

Q. The only objects you could see were the two points, Ship Rock and Twin Rock?

A. No. That is an ambiguous question. You could see lots of things besides that, but that is the only two points that I could see that I could take a bearing on. I could see another line of mountains, above.

Q. You could have seen the peak at the top of the mountain?

A. There is no peak shown on the chart that could be identified at night.

Q. No peaks shown on the chart?

A. Not in sight.

Q. Couldn't see Black Jack?

A. Certainly, but there was no point identifiable on the chart.

[fol. 60] Q. You have been in those water- four or five years?

A. Yes.

Q. But can't identify those peaks?

A. I could identify them to myself, but they are not shown on the chart.

Q. Just because you were on a line between Ship and Twin Rocks, and you took an angle bearing to Ship Rock, you took no other compass bearing?

A. No.

Q. And you were right alongside of the Reliance for how long?

A. Something over an hour. I don't remember the exact minutes.

Q. What did you do when you boarded the boat, with reference to the net?

A. Just looked at it.

Q. Was the net all aboard the boat at that time?

A. No.

Q. How many fathoms were off?

A. Probably half of it. Possibly 150.

Q. Was the ring or cork line or lead line aboard the ship?

A. Not the cork line but the lead line, which was the purse line.

Q. How much of the cork line was out?

A. Same amount as the net.

Q. It was all bagged up; no way for the fish to get in or out?

[fol. 61] A. No, sir.

Q. They were busy bringing the balance of the net back aboard the vessel?

A. Yes.

Q. How long did it take them to bring in the balance of the net, what was in the water?

A. Something over an hour. Probably an hour and five or ten minutes.

Q. And they had the cork line and the lead line aboard at the time you boarded it?

A. No, part of the cork line was out.

Q. But they had the purse line and the lead line in?

A. Yes.

Q. And it still took them an hour and ten minutes to bring in the balance of the net?

A. Yes.

Q. Do you have any way of fixing in your own mind how long it would have taken to bring in the net after it was set and pursed?

A. The first half of the net would go faster than the last half. Possibly half an hour more than that. An hour and forty-five.

Q. Over and beyond the hour ten?

A. No, probably thirty minutes — than I was aboard the vessel.

Q. You say you were aboard the vessel looking at the net. [fol. 62] What was the next step you took in relation to that net?

A. The next step was to put the evidence tag on the net.

Q. What do you mean by 'evidence tag'?

A. The tag which shows that this property is evidence. It shows the section that it is taken under, making it a misdemeanor, and so forth to fish in certain waters.

Q. All the matter on the tag relates to evidence?

A. Well, it gives the place to fill in the name filled out and so forth.

Q. Other than the descriptive matter, is there anything that would point out that the net is being held for evidence, as disclosed by the card?

A. That is all.

Q. And there is nothing else on it?

A. No.

Q. After you tagged the net, what did you do with the net then? Incidentally, did you wait until they had the net all on board the vessel before you put the tag on it?

A. Yes.

Q. And then what did you do? Did you stay aboard the vessel?

A. Yes.

Q. At all times until it was delivered at San Pedro?

A. No, sir.

Q. Or any of your deputies?

A. No, not all the time. There was probably twenty min-
[fol. 63] utes when my deputy stayed on board and watched the boat.

Q. But he did not stay on board the vessel?

A. Only except that twenty minutes.

Q. During that twenty minutes he was on board?

A. Yes.

Q. Who was that deputy?

A. I had two. One was Mr. Page and one was Mr. Shelton.

Q. Both of them were present at all times?

A. Yes.

Q. Until the vessel was delivered at San Pedro, from the time you boarded it between Ship Rock and Twin Rock?

A. Yes, as far as I know. If I was not there I could not swear that they were there, but they said they were.

Q. When the vessel got back to Avalon, you left the vessel?

A. Yes.

Q. You did not go back aboard the vessel after that?

A. Surely.

Q. When?

A. I don't believe I was off the vessel again until it arrived at San Pedro and then we took turns guarding the net on the vessel at San Pedro.

Q. At the time the net was back on board the vessel, and it started for Avalon, who was in charge of the navigation?

A. The Captain. There was some of us aboard the vessel
[fol. 64] all the time it was under way.

Q. Were you aboard the vessel from the time of the boarding by you around eleven forty-five until the vessel arrived at Avalon?

A. Yes.

Q. But you did not come back with the vessel from Avalon?

A. Convoyed it back with the patrol boat.

Q. But you did not stay aboard?

A. No.

Q. The vessel was in charge of its captain?

A. Yes, but my engineer was riding with him. He was aboard.

Mr. Ekdale: That is all.

Redirect examination.

By Mr. McCormick:

Q. At the time you boarded the boat, did you have any conversation with the captain or members of the crew?

A. Yes, sir.

Q. Approximately how long did that conversation take place?

Mr. Ekdale: Objected to as immaterial.

Mr. McCormick: You brought this up yourself, and we have a right to go into to. I am not asking for the conversation. It is just a preliminary question.

The Court: Overruled.

[fol. 65] A. I can't say how long it lasted.

Mr. McCormick: Approximately.

A. Half the time I was aboard the vessel.

Q. You said at the time you boarded the vessel the members of the crew were engaged in pulling the net in?

A. Yes.

Q. Did they stop doing that when you boarded the boat?

A. No, they continued.

Q. Did they continue during the entire time that you were on the boat?

A. Yes, sir.

Q. And you said it took about an hour and ten minutes to get the remainder of the net in, which was in the water at the time you boarded the vessel?

A. Yes.

Q. Then after this hour and ten minutes, did you start for Avalon?

A. Yes.

Q. Did you take any measurements at that time to ascertain your location?

A. No instrument bearings, no, sir.

Q. Did you observe by your eyes where you were?

A. Yes, sir.

Q. Could you tell us whether or not the boat had drifted?

A. It had not.

[fol. 66] Q. In other words, it was substantially in the same place as it was at the time you boarded it?

A. Yes.

Q. And you noticed and observed that fact?

A. Yes.

Q. Was there any anchor on the boat?

A. It was not anchored.

Q. Free in the water?

A. Yes.

Q. I just want to clear this point up. Did I understand you in your testimony to say that you turned the net over to Captain Groat?

A. Yes.

Q. Where did you turn the net over?

A. At San Pedro.

Q. The net was the same you had placed the tag upon on that particular night?

A. Yes, sir.

Q. Were you present when the net was actually removed from the vessel?

A. I was not.

Q. You testified you had a conversation with the captain?

A. Yes, sir.

Q. Who was present besides yourself on that occasion?

A. I did not notice who was around. There were the crew members and Mr. Shelton was there at the time.

[fol. 67] Q. He was your engineer?

A. Mr. Page was the engineer. He was in the boat, sometimes alongside of us and sometimes in front of us, with the patrol boat.

Q. Were the crew in hearing of that conversation?

A. Yes.

Q. State the conversation.

Mr. Ekdale: Objected to as incompetent, irrelevant and immaterial, and hearsay, as against the owners of the net.

Mr. McCormick: The theory upon which I asked the question is this: that as I have heretofore stated, this proceeding makes no distinction between the owner of the net or any person who happens to be using it and therefore it is incumbent on the petitioners to bring out whether it was actually being illegally used. If someone other than the owner was using the net, as the evidence shows, I think any statements with reference to the use of the net would be admissible as showing that the net was being illegally used, and therefore the conversation would be admissible.

Mr. Ekdale: How would it be bound up by a conversation with some third party. Purely hearsay.

The Court: It is an action against the net itself.

Mr. McCormick: Yes, it is in-rem action. It is a question of the forfeiture of the net.

Mr. Ekdale: The owners could not be bound by the testimony of some third party. Supposing, we will say, that [fol. 68] there was a guest on board the vessel, and he said, "Sure, I was using the net". Does that make it the subject of forfeiture as against us? A net of over a thousand dollars in value?

The Court: No, I don't think that would, but I can see how possibly the other might. I will allow you to raise that question in the briefs. Overrule the objection at this time.

Mr. McCormick: State the conversation.

A. The first thing that I said to the captain, I asked him if he was the captain, and he said he was. I told him he was under arrest, and also the members of his crew, for fishing in District 20 with a purse seine net; and I asked him how he came to commit the violation, and he said, "What are you going to do?" Some of the other boats do it." Then he said he would rather go to San Pedro than Avalon. And I told him he would have to go to Avalon, which we did, and then we talked some about the fish, how to determine what variety of fish it was, maybe by the glow that they made in the water at night, and so forth; and after we got on the dock, I believe it was, he turned to me and said—thanked me for giving them halfway decent treatment, and shook hands with me, telling me that ordinarily the officer tried to bulldoze a man who had done something he should not have done, and wanted to know how long he would be detained, and I told him no longer than was necessary to complete the action. I be- [fol. 69] lieve that was about all.

Q. Did he in that conversation state to you that he knew he was in a restricted area?

Mr. Ekdale: Objected to as leading and suggestive; already asked and answered.

The Court: Sustained.

Mr. McCormick: Do you remember any other conversation at that time that you have not related?

Mr. Ekdale: The witness has already stated that that was all.

Mr. McCormick: I know, but after all he might have missed something.

Mr. Ekdale: If you want to tell him about it, all right.

The Witness: Well, I asked him why he did it, and he said, "What are you going to do. You have to make a living." He said, "Some of the other boats had done it," the same way they had, and asked me what the penalty had been on the two boats where the captain had been arrested about ten days previous to the time of his arrest, and I told him the disposition of the cases.

Q. Is that all you remember of the conversation?

A. That is about all.

Mr. McCormick: That is all.

[fol. 70] Mr. Ekdale: How many seizures of nets have you made over at Catalina?

Mr. McCormick: Objected to as incompetent, irrelevant and immaterial. No possible bearing on the case.

Mr. Ekdale: I think I can show what has happened on another net—I want to show what the difference is between the two. If it is not material, it may go out.

The Court: I don't see how it can be material, what they did on another net. Sustained.

Mr. Ekdale: You have said that while you were aboard the vessel, it did not drift. Did you take any other sights?

A. No more than watching the shore line.

Q. Was there a moon?

A. No, there was starlight.

Q. And you watched the shore to see whether there was a drift?

A. Yes.

Q. As a matter of fact there is less drift close to the shore than two or three miles out?

A. That is a rather ambiguous question.

Q. I will reframe it. The current that is running around Catalina and its adjacent islands, is far stronger more than two and a half miles out, then in close to the shore?

A. Not always.

Q. You would not say that is the general rule?

A. No.

[fols. 71-97] Q. Do you have any idea of the value of a new net like this one?

Mr. McCormick: Objected to as immaterial.

The Court: Sustained.

Mr. Ekdale: That is all.

Mr. McCormick: At the time you boarded the boat did you have any conversation with either the captain or the members of the crew with reference to the location of the boat?

A. No, not as to just where it was.

Mr. McCormick: That is all.

[fol. 98] IN DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

Civil No. 11319

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners and Respondents,

vs.

PURSE SEINE NET, Approximate Length 325 Fathoms, Approximate Depth 32 Fathoms, Approximate Size of Mesh 5 to 8 Inches, Respondent,

C. J. HENDRY COMPANY, a Corporation, and FRANK SEMATOVICH, Claimants and Appellants

OPINION—Filed January 31, 1940

The petitioners sued to have adjudged forfeited to the State Fish and Game Commission a purse seine net used by the owners unlawfully for fishing in the waters of the state. The petitioners had their judgment.

The single question stated by appellants in their opening brief is whether the state courts have jurisdiction of the proceeding. Asserting that the fishing net was a part of the "apparel and furniture" of a sea going vessel, the appellants advance the argument that the federal courts alone have jurisdiction of such forfeiture proceedings. Section 845 of the State Fish and Game Code provides for proceedings [fol. 99] in the state superior courts leading to the forfeiture, sale or destruction of nets in violation of the terms of the code. No provision is made for such proceedings in the federal courts, hence, the question here is whether the code sections are constitutional. Appellants concede the state's

power to regulate and control fishing and to forfeit the net, but they state that the forfeiture is a "cause of admiralty cognizance", and hence, that the state courts have no jurisdiction. The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397, and similar cases are cited holding that maritime contracts and torts are exclusively within maritime jurisdiction. We do not find that any of these cases have any bearing upon the question before us. The controlling authority is Smith v. Maryland, 59 U. S. 71, involving a state statute providing for the forfeiture of a scoop or drag used for catching oysters within state waters. The point involved was whether the statute conflicted with the federal jurisdiction in admiralty. At page 76 the court says: "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the [fol. 100] jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." To the same effect are Manchester v. Massachusetts, 139 U. S. 240, 260; and Miller v. McLaughlin, 281 U. S. 261, 74 L. Ed. 840. This language is found on page 264 of the latter decision: "The claim under the 14th Amendment is also groundless. A state may regulate or prohibit fishing within its waters. (Manchester v. Massachusetts, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559 * * * and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instruments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor." (Citing cases.)

The supreme power of the state to regulate and control fishing within its territorial waters cannot be denied. Bayside Fish Flour Company v. Gentry, 297 U. S. 422, 80 L. Ed. 772.

For these purposes the state has policing jurisdiction of [fol. 101] these waters, and to accomplish the end may enact such reasonable police regulations as it may deem proper. Thus the state may prohibit the use of dynamite or fire arms for taking fish within its waters, and may seize and confiscate such articles if necessary to make its regulations effective. The code sections fixing the procedure for the forfeiture of nets unlawfully used in fishing within its territorial waters are justified upon the accepted doctrine that the power to make regulations includes the power to enforce them. In such legislation there is no conceivable conflict with the admiralty jurisdiction of the United States.

It is argued that the petition is insufficient because it does not specifically allege that the net was used "in taking fish." The charging part of the petition is that it was used "wilfully and unlawfully * * * contrary to the provisions of the existing statutes * * * in violation of the provisions of section 842 of the Fish and Game Code * * *." This is not a criminal proceeding. The pleading meets all the requirements of section 845 of the Fish and Game Code. The petition acquainted the owners with the nature of the proceeding. It also stated the date and place of the alleged violation, the statute claimed to have been violated, and the character of the relief sought, namely, the forfeiture of the net. Such notice was all that the statute [fol. 102] required. People v. One 1933 Plymouth Sedan, 13 Cal. (2d) 565, 569.

There is no merit in the contention that this court is without jurisdiction to hear the cause. The appeal was taken to the district court of appeal of the second appellate district. That court, deeming that the cause was in equity, transferred it to the supreme court. That court transferred the cause here for determination. The appellant now contends that the cause is not one in equity, that jurisdiction of the appeal lay in the district court of appeal of the second district, and that its transfer by that court to the supreme court was therefore void. Under section 4c of Article VI of the constitution the supreme court has power to transfer any cause "pending" before it, or any cause "pending before a district court of appeal" to any other district court of appeal for hearing and decision. Under section 4a a district court may transfer a cause to the

supreme court if the appeal was not taken to the "proper" court. Hence, if the order of transfer from the district court to the supreme court was void because the cause was not in equity, then the order was ineffective and the cause was still "pending" in the district when transferred here by the supreme court. If that transfer was not void, but voidable by error, it has become valid by the lapse of the sixty day period. If the original transfer to the supreme court was valid, then, too, the transfer here from the latter [fols. 103-104] court was in accord with the constitutional provision. Any descriptive matter in the order of transfer is immaterial so long as the cause is identified and the purpose of the order is within the court's jurisdiction.

The judgment is affirmed.

Nourse, P. J.

We concur: Sturtevant, J. Spence, J.

[fol. 105] In Supreme Court of California. In Bank

D. C. A. 1st Dist., Div. 2. No. 11319. L. A. 16192.

Action Due: 3-30-40

Moore et al.

vs.

Purse Seine Net et al.

Order Granting Petition for Rehearing After Judgment in the District Court of Appeal—Filed March 30, 1940

Appellants' petition to have the above entitled cause heard and determined by this Court, after judgment in the District Court of Appeal of the 1st Appellate District, Division 2, is Granted, and said cause transferred to this Court for hearing and decision.

Dated March 29, 1940.

——, Chief Justice; Curtis, Justice; Edmonds, Justice; Houser, Justice, Carter, Justice.

[File endorsement omitted.]

[fol. 106] IN SUPREME COURT OF CALIFORNIA

L. A. No. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, Petitioners and Respondents,

vs.

PURSE SEINE NET, Approximately 325 Fathoms Long, 32 Fathoms Deep, Approximate Size of Mesh Five to Eight inches, Respondent, C. J. Hendry Company, a Corporation, and Frank Sematovich, Claimants and Appellants

OPINION—September 21, 1940.

In a statutory proceeding, a large purse seine net was adjudged forfeited to the Fish and Game Commission of the State of California because of a use which the court found was unlawful. The appellants were the owners of the net at the time it was seized.

The facts are undisputed, and the only question for decision is whether the court had jurisdiction to entertain the proceeding. The appellants do not challenge the state's power to regulate fishing in its territorial waters, to close [fol. 107] certain waters to fishing with nets, and to provide by law for the forfeiture of nets used in violation of its regulations. But they contend that as the present proceeding is one *in rem* against a thing maritime seized in navigable waters, the federal courts have exclusive jurisdiction.

When seized the net was being used by the purse seine fishing boat RELIANCE, on which it belonged in fishing operations. It is conceded that the boat was then within waters in which the taking of fish by net was unlawful.

The Fish and Game Commission filed its petition in the Superior Court reciting these facts and asking for a judgment declaring the net to be a public nuisance, forfeiting it, and ordering its destruction or sale. Upon the filing of this petition, the court ordered public notice of the time and place of its hearing to be given. On the day fixed, the appellants appeared and filed their claim as owners of the net. The judgment of forfeiture followed.

The principal contention of the appellants is that as the thing seized was part and parcel of a ship; the Superior Court has exercised admiralty jurisdiction in a proceeding

in rem brought to accomplish a maritime forfeiture of a maritime object in accordance with the conventional procedure of courts of admiralty. This, they say, constitutes [fol. 108] an invasion of the exclusive province of the United States courts upon whom admiralty jurisdiction is conferred by the Constitution of the United States and the acts of Congress. In support of the judgment, the respondent insists that as the state may validly legislate to protect fish and game, its courts may enforce the penalties of a statute enacted for that purpose.

In any maritime case there are two fields in which conflict may occur between the laws and judicial proceedings of a state and those of the United States. The first is in the field of substantive law. A state may not constitutionally adopt and enforce laws which materially interfere with the harmony and uniformity of the maritime law in its international and interstate relations, or which contravene a paramount act of Congress. This is not a conflict of jurisdiction and the question concerns only substantive law.

But conflict may occur in another field. As admiralty jurisdiction is vested exclusively in the courts of the United States, no state court may conduct proceedings according to the course of admiralty or administer admiralty remedies. Its proceedings are limited to those cognizable at common law.

In this case the appellants do not claim that there is any conflict between the substantive provisions of the California Fish and Game Code, under which the proceeding was brought, and maritime law. But lack of conflict in this [fol. 109] regard is not determinative of the case, for jurisdiction in admiralty depends upon maritime subject-matter and not upon the source or character of the substantive law which is being administered. If the property proceeded against is a thing maritime and the place of seizure is on navigable waters, the cause is clearly within the maritime jurisdiction, and it is immaterial whether the substantive law which authorizes the forfeiture is a law of the United States or of a state.

Admittedly the net in this case was seized upon navigable waters. The vessel from which it was taken was engaged in fishing, and the net was a part of her equipment. If it was necessary to the ship's enterprise and indispensable for the accomplishments of the objects of the particular voyage,

it was, in legal contemplation, a part of the vessel, although it was not required for navigation. (*Turner* vs. *United States*, 1928 A. M. C. 1089, 27 F. (2d) 134; *Buffalo*, 148 Fed. 331; *Edwin Post*, 11 Fed. 602; *Witch Queen*, 30 Fed Cas. 396.)

The true criterion by which to determine whether any vessel or its appurtenances is subject to admiralty is the business or employment for which it is intended, or may be used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion. "If the business or employment of vessels appertain to travel, or trade [fol. 110] and commerce on public navigable water, it is sufficient and the jurisdiction attaches." (*General Cass*, 10 Fed. Cas. 169, 170; *E. M. McChesney*, 8 Fed. Cas. 668; *Alabama*, 22 Fed. 449; *City of Pittsburgh*, 45 Fed. 699; *Public Bath No. 13*, 61 Fed. 692; 1 Benedict, *Admiralty*, 5th ed., p. 2.)

A fishing vessel leaves the mainland with her hatches empty and navigates to a place where the fish are abundant. She is then maneuvered so that the net encircles a school of fish. The fish are drawn aboard and transported back to land. This transportation is as essential a part of the fishing business as is the pursing and hauling in of the net and is certainly an activity in aid of trade and commerce. It is an essential step in getting the fish to market. Hence, at the time the net here in controversy was seized, it was a part of the appurtenances of the RELIANCE, or to use the phraseology of the American admiralty, a part of her "tackle, apparel and furniture". In legal contemplation it was a part of the vessel itself, just as were her engines, her stores and her navigation equipment, and a subject of admiralty jurisdiction.

However, a further question must be answered. Is this proceeding one which may be prosecuted in a state court?

Although by the Constitution of the United States, the jurisdiction of admiralty causes is vested in the federal [fol. 111] courts (art. III, sec. 2), by statute there is saved to suitors "the right of a common-law remedy where the common law is competent to give it" (28 Mason's U. S. C., sec. 371). But a decree *in rem* is not a remedy which the common law is competent to give; it is authorized only by the civil law. The Constitution "only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common law

courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute." (*Moses Taylor*, 71 U. S. 411.)

This rule was followed and applied in California as early as 1871 (*Crawford* vs. *The Bark Caroline Reed*, 42 Cal. 469). Later in *Fischer* vs. *Carey*, 173 Cal. 185, jurisdiction of an action for partition of a vessel was disclaimed, although it was one in equity against a personal defendant. The court pointed out that although the action was personal in form, in substance it was a suit *in rem*, and any decree of the court would act directly upon the vessel by taking it into the custody of the court, through a receiver, and ordering a sale. This was held to be an invasion of the exclusive jurisdiction of the courts of admiralty. To the same effect is the case of *Glide*, 167 U. S. 606, where the [fol. 112] court decided that although a state may enact a law providing for a lien against a ship, it may only be enforced in a federal court of admiralty. And in a more recent consideration of the rule as it applies to facts substantially identical with those now before the court, the conclusion was reached that a state court has no jurisdiction in a proceeding brought for the forfeiture of a fishing boat for violation of a state law. In that case the facts showed that the boat was seized upon the charge of fishing without a license. The director of fisheries of the State of Washington filed a petition in the Superior Court of that state praying for the confiscation and forfeiture of her engines, tackle, apparel, furniture, equipment, and seine net. The state court was denied jurisdiction (*Bessie Mac.*, 1938 A. M. C. 77, 21 F. Supp. 220).

The respondent relies on *Smith* v. *Maryland*, 59 U. S. 71, where, it is true, the court held that a state law did not conflict with the jurisdiction of admiralty. But this case has been overruled by the later decisions which are directly to the contrary. It was pointed out in the *Glide case, supra*, that the question whether a claim of a maritime nature could be enforced in the state courts by process *in rem* under a state statute creating a right in the thing itself was not brought to the court directly until the cases of the *Moses Taylor, supra*, and *Hine* vs. *Trevor*, 71 U. S. 555. In the [fol. 113] first, it was determined that a suit against the

vessel or thing is a proceeding *in rem* and is not a remedy afforded by the common law, hence, the admiralty court had exclusive jurisdiction. Later in the same term, the court in *Hine* vs. *Trevor, supra,* decided that as the vessel was sued in a state court for a tort arising from a collision, the judgment should be reversed and remanded with directions to dismiss for want of jurisdiction. The remedy pursued, said the Court, partook of all the essential features of an admiralty proceeding *in rem* which is in no sense a common-law remedy so as to come within the exemption of the law which "saves to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

For these reasons, the judgment must be reversed with directions to the Superior Court to dismiss the proceeding. As one acknowledged authority upon admiralty law has written, "The right to proceed *in rem* is the distinctive remedy of the admiralty and hence administered exclusively by the United States courts in admiralty: no state can confer jurisdiction upon its courts to proceed *in rem*, nor could Congress give such power to a state, since it would be contrary to the constitutional grant of such power to the Federal Government." (1 Benedict, *Admiralty*, 5th ed., sec. 23.) See, also, *Knapp, Stout & Co.* vs. *McCaffrey*, [fols. 114-115] 177 U. S. 638; *Crawford* v. *Bark Caroline Reed, supra.*

It is so ordered.

Edmonds, J.

We concur: Gibson, C. J. Shenk, J. McComb, J. pro tem.

[fol. 116] In Supreme Court of California. In Bank

[Title omitted]

Order Vacating Judgment—Filed October 21, 1940

Upon petition for rehearing, the judgment of the court, heretofore entered herein, is hereby vacated and set aside.

Gibson, Chief Justice. Shenk, Justice. Curtis, Justice. Traynor, Justice. Carter, Justice.

Dated: Oct. 17, 1940.

[File endorsement omitted.]

[fol. 117] IN SUPREME COURT OF CALIFORNIA. IN BANK

L. A. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, Petitoners and Appellees,

vs.

PURSE SEINE NET, Approximately 325 Fathoms Long, 32 Fathoms Deep, Approximate Size of Mesh Five to Eight Inches, Respondent, C. J. Hendry Company, a Corporation, and Frank Sematovich, Claimants and Appellants

OPINION—Filed October 20, 1941

California law enforcement officers seized a large purse seine fishing net in use on the fishing boat "Reliance" in navigable waters of the Pacific Ocean adjacent to Catalina Island. The taking of fish by net within these waters is unlawful. (Fish and Game Code, sec. 842). The California Fish and Game Commission filed a petition in the Superior Court asking for a judgment to declare the net a public nuisance forfeited to the State, and to order its destruction or sale under the provisions of section 845 of the Fish and Game Code. A judgment of forfeiture issued from which the owners of the net have appealed. They do not challenge [fol. 118] the power of the state to enact legislation regulating fishing within territorial waters and providing for the forfeiture of nets used in an illegal manner, but they contend that the state court has no jurisdiction to proceed in the action because it is a maritime cause of action within the exclusive admiralty jurisdiction of the federal courts.

Section 9 of the Judiciary Act of 1789 and later statutes re-enacting the same provision (Judicial Code, secs. 24 (2), 256; 28 U. S. C. A. 41, subd. 3, 371) provide that the federal district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." (See *The Moses Taylor*, 4 Wall. 411.) The present proceeding involves a maritime cause of action. If the property proceeded against is an integral part of the vessel or its equipment and is seized on navigable waters the cause is maritime. (*Turner* v. *U. S.*, 27 Fed. (2d) 134; *The Buffalo*,

148 Fed. 331; *The Witch Queen*, 30 Fed. Cas. 396.) This fact alone, however, does not establish that the action is within the exclusive jurisdiction of the federal courts. The saving clause of the Judiciary Act makes it clear that a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued [fol. 119] is traditionally within the jurisdiction of the common law courts. Even though the right to sue is created by a recently enacted state statute, it is within the saving clause so long as the remedy is of a type recognized at common law (*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109), including equity. (*Knapp-Stout & Co.* v. *McCaffrey*, 177 U. S. 638.)

If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the federal admiralty courts to entertain the action. (Reynolds v. Steamboat Favorite, 10 Minn. 100, 193; N. J. Steam Nav. Co. v. Merchant's Bank, 6 How. 344, 390; Percival v. Hickey, 18 Johns (N. Y.) 257; 1 Kent Com. 367, 377; 1 Story, Constitution, 533. See Am. Steamboat Co. v. Chase, 16 Wall. 522; Sherlock v. Alling, 93 U. S. 99; Fisher v. Boutville Trans. & Towing Co., 162 Fed. 994; International Nav. Co. v. Lindstrom, 123 Fed. 475; The Harrisburg, 119 U. S. 213; The Hamilton, 207 U. S. 398; Aurora Shipping Co. v. Boyce, 191 Fed. 966.) "The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in a common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away." (Benedict, Admiralty (5th ed.) sec. 23. See Knapp-Stout & Co. v. McCaffrey, supra; Red Cross Line v. Atlantic Fruit Co., supra.) The fact that federal forfeiture statutes, similar to [fol. 120] that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (See The Sarah, 8 Wheat. 391; U. S. v. The Betsy and Charlotte, 4 Cranch 433; The Confiscation Cases, 7 Wall. 454; U. S. v. La Vengeance, 3 Hall 297; U. S. v. Grundy, 3 Cranch 337; The Palmyra, 12 Wheat. 1) does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy.

It is therefore necessary to determine whether this forfeiture proceeding by the state is the type of action which was cognizable in a common law court. In 1789 when the Judiciary Act was enacted there had been little development of the common law in federal or state courts of the United States. An examination of the English common law as it existed before that time must therefore be made.

In determining the jurisdiction of the English common law courts, acts of Parliament defining that jurisdiction must be taken into account. It is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament. (Martin v. Superior Court, 176 Cal. 289; People v. Richardson, 138 Cal. App. 404.) Other jurisdic- [fol. 121] tions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies from the Mother Country in 1776 are included within the English common law. (See cases cited in 78 U. of Pa. L. Rev. 195; 11 Am. Jur. 166; 22 L. R. A. 508, et seq.)

Appellants' contention that the present proceeding is of a type unknown to the common law courts because it is an action in rem against the net itself rather than in personam against the owners of the net is unsound. While it is true that actions in common law courts are usually in personam as contrasted to the in rem proceedings of the courts of the Admiralty, it has long been established that an action in rem can be brought by the State in an ordinary common law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes. The Statute of 12 Car. II, c. 18 (7 English Statutes at Large) enacted in 1660 provided that all imports to and exports from England and its possessions must be in English ships "under the penalty of the *forfeiture and loss of all the goods and commodities* which shall be imported into or exported out of any the aforesaid places in any other ship or vessel, *as also of the ship or vessel, with all its guns, furniture, tackle, ammunition and apparel;* one third part thereof to his Majesty, [fol. 122] his heirs and successors; one third part to the governor of such land, plantation, island or territory where such default shall be committed, in case the said ship or

goods be there seized, or otherwise that third part also to his Majesty, his heirs and successors; and the other third part to him or them who shall seize, inform or *sue for the same in any court of record*, by bill, information, plaint or other action, wherein no essoin, protection or wager of law shall be allowed;". (Italics added.) This statute, providing for the institution of forfeiture proceedings in any court of record against ships and cargoes used in violation of the act clearly authorized a remedy by forfeiture in the common law courts. In the case of Roberts v. Withered (1696) 5 Mod. 193; 12 Mod. 92; L. Salk 223, it was held that in proceeding to forfeit a ship and cargo under the above act, an action of detinue would properly lie in the court of the King's Bench. "* * * for My Lord Coke (b) was of the opinion, that the bringing a replevin is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the act, the property is divested out of the former owners; and by this action now brought, it is vested in the plaintiff, and therefore he may bring detinue for it." This decision was approved in Wilkins v. Despard, 5 Durnf. & East's Rep. 112.

Such forfeiture to the State of illegally used articles has [fol. 123] continued as an accepted common law procedure. The statute of 13 & 14 Car. II. c. 7, 11, 18, 20 (8 English Statutes at large) provided for the forfeiture in common law courts of various articles used in violation of law, certain types of vessels being included in chapter 11. The Customs Consolidation Act of 1876 (39 & 40 Vict. c. 36) imposes, as part of the penalty for smuggling, forfeiture to the Crown of the goods smuggled and the *ship, boat*, carriage, or horse used for their conveyance. Chapter 36, par. 218 of the act provides: "All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts * * * may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the *High Court of Justice in England, the superior courts of common law* at Dublin or Edinburgh * * * or by information in the name of some officer of Customs or Excise, before *one or more justice or justices* in the United Kingdom, the Isle of Man, or the Channel Islands * * *." (Italics added.) (See 9 Halsbury's Laws of England 377; Frailey v. Charlton (1920) 1 K. B. 147.) While this statute is of recent origin, it indicates that at the present time in England forfeiture proceedings against

vessels and cargo are instituted in common law courts rather than courts of admiralty. (See also Dangerous Drugs Act, 1920, 10 & 11 Geo. 5, c. 46, s. 14 as amended, 1923, 13 & 14 Geo. 5, c. 5, s. 2 (1); 22 Halsbury's laws of England 399.)

[fol. 124] In the United States the federal government from early times has provided for the forfeiture of certain articles used in violation of law. (See 14 Stat. L. 156; 14 Stat. L. 151, 165; 13 Stat. L. 240; 14 Stat. L. 178; 12 Stat. L. 319; The Sarah, 8 Wheat. 391. See also Internal Revenue Code secs. 3720 et seq., 2154, 2155 et seq.; 26 U. S. C. A. 339, 552, 553; 19 U. S. C. A. 1088.) California has likewise exacted forfeiture of various illegally used articles. (Pen. C. sec. 325 (1872); Health and Safety Code secs. 12304-5 (former Stats. 1887, ch. 95, p. 110); Health and Safety Code sec. 11610.) The early federal statutes required that in the trial of cases involving seizures made on waters navigable by vessels of ten tons burden and upward the court sit as a court of admiralty (See The Sarah, supra; Reynolds v. Steamboat Favorite, supra, 193), but the federal cases themselves recognize that such forfeiture proceedings constituted a valid remedy at common law. Thus, in the case of The Palmyra, supra, Mr. Justice Story stated: "It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. * * * In the contemplation of the common law the offender's right was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem cognizable on the revenue side of the exchequer. The thing is here pri- [fol. 125] marily considered as the offender, or rather the offense is attached primarily to the thing." (See U. S. v. 5 Boxes of Asafoetida, 181 Fed. 561; The Sarah, supra.)

There are cases which state that an in rem action against a vessel is not a common law remedy and is therefore within the exclusive admiralty jurisdiction of the federal courts. (The Moses Taylor, supra; The Ad. Hine v. Trevor, 4 Wall. 555; The Glide, 167 U. S. 606; The Belfast, 7 Wall. 624.) These cases, however, were concerned with types of in rem proceedings that were foreign to the common law. They are authority for the rule that a state court can have no jurisdiction over an action in rem against a vessel when such action has no counterpart in the common law courts.

(See Knapp-Stout & Co. v. McCaffrey, supra.) But these cases are not controlling in circumstances where the common law provided an analogous remedy. As stated by the Supreme Court of Minnesota in Reynolds v. Steamboat Favorite, supra: "In England in the court of exchequer, and in the United States in the district courts in seizures made on land for violation of the revenue laws, the proceedings are in rem, according to the course of the common law. Though a proceeding is in rem, it is not necessarily a proceeding or cause in admiralty. The Sarah, 8 Wheat. 391; United States v. 422 Casks of Wine, 1 Peters, 547; L. Kent Comm. 374-5-6."

[fol. 126] The courts of other jurisdictions with statutes similar in nature to the one now under consideration have enforced such forfeitures under the assumption that they had jurisdiction to do so. (See State v. Umaki, 103 Wash. 232; State v. Mavrikas, 148 Wash. 651; Sterrett v. Gibson, 168 S. W. (Tex. Civ. App.) 16, aff'd 172 S. W. 1198. See also Mirkovich v. Milnor, 34 Fed. Supp. 409; Dick v. Anderson, 57 Cal. 251.). In the case of The Bessie Mac, 21 Fed. Supp. 220, a federal district court held that forfeiture proceedings under a Washington statute similar in nature to that of California were maritime in nature and should therefore be brought in a federal court. The court, however, failed to consider whether such proceedings, though maritime, constituted a common law remedy within the saving clause of the Judiciary Act.

It is therefore clear that the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act. (Red Cross Line v. Atlantic Fruit Co., supra.)

Appellants contend that the petition for forfeiture filed by the Fish and Game Commission did not allege that the purse seine net in question was used for the taking of fish and therefore failed to state a cause of action. The petition stated, however: "That said purse seine net • • • [fols. 127-128] is and was at all times herein mentioned an appliance used for the taking of fish" and "was • • • used in violation of the provisions of Section 842 of the Fish and Game Code of the State of California." This constitutes a sufficient allegation that the net was illegally used to catch fish.

Since the judgment of forfeiture in the instant case pronounced the net in question a public nuisance pursuant to section 845 of the Fish and Game Code which declares any net used in violation of law to be a public nuisance, the action is one to abate a nuisance and therefore within the appellate jurisdiction of the District Courts of Appeal. (Cal. Const. Art. 6, sec. 4 b.) Although the original appeal was improperly transferred to this court by the District Court of Appeal of the Second Appellate District, this court on November 20th, 1939, transferred the cause to the District Court of Appeal of the First Appellate District. The case is now here by virtue of an order granting a hearing after decision by that court. This court therefore has jurisdiction for all purposes. (Cal. Const. Art. 6, sec. 4 c.)

The judgment is affirmed.

Traynor, J.

We Concur: Gibson, C. J. Curtis, J. Carter, J.

[fol. 129] In Supreme Court of California. In Bank

Order Due Nov. 19, 1941

[Title omitted]

Order Denying Rehearing—Filed November 18, 1941

Appellants' petition for a rehearing is Denied.
Edmonds, J., voted for a rehearing.

Dated Nov. 17, 1941.

Shenk, Acting Chief Justice.

[File endorsement omitted.]

[fol. 130] IN SUPREME COURT OF CALIFORNIA

Los Angeles No. 16192*

On Appeal from the Superior Court in and for the County of Los Angeles. (Superior Court No. LB-C-7558)

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners, Respondents,

vs.

PURSE SEINE NET, etc., Respondents,

C. J. HENDRY COMPANY, a Corporation, and FRANK SEMALOVICH, Claimants, Appellants

REMITTITUR

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Los Angeles, in the above entitled cause, be and the same is hereby affirmed.

Respondents to recover costs on appeal.

[fol. 131] I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 20th day of October, 1941, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 21st day of November, A. D. 1941.

B. Grant Taylor, Clerk, by L. F. White, Deputy.
(Seal.)

[fol. 132] [File endorsement omitted]

[fol. 133] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed January 22, 1942

To the Honorable, the Chief Justice of the Supreme Court of the State of California:

Your petitioners, C. J. Hendry Company, a corporation, and Frank Sematovich, respectfully show:

I

Your petitioners are the owners of the purse seine net, respondent herein, and claimants and appellants in this cause.

[fol. 134] The appellees above named filed a petition in the Superior Court of the State of California, in and for the County of Los Angeles, on June 24, 1936, praying that the respondent purse seine net be adjudged forfeited to the State of California. The appellants duly appeared in said proceeding, claimed the respondent net as owners thereof, and, after hearing, judgment was rendered therein in favor of the appellees adjudging the respondent net to be forfeit to the State of California.

An appeal from said judgment to the District Court of Appeal, for the Second Appellate District, of the State of California, was duly transferred to the Supreme Court thereof; thereafter transferred by the Supreme Court to the District Court of Appeal, for the First Appellate District, for hearing and determination, and said judgment was affirmed by said District Court of Appeal. Thereafter, on petition of the appellants, the Supreme Court of the State of California ordered said cause transferred to it for hearing and determination, and thereafter, by judgment rendered on October 20, 1941, said Supreme Court affirmed the said judgment. Thereafter your petitioners, the appellants, applied for a rehearing, which was denied by the said Supreme Court on November 18, 1941.

II

In said cause there is drawn into question the validity of [fol. 135] a statute of the State of California, to-wit, Section 845 of the Fish and Game Code of California, on the ground that as construed and applied herein it is repugnant to the Constitution and laws of the United States, to-wit, Article III, Section 2, of the Constitution of the United States, providing that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction and to those parts of Sections 24 and 256 of the Judicial Code of the United States vesting exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction in the District Courts of the United States, and the decision herein is in favor of the validity of said state statute.

And your petitioners pray for the allowance of an appeal from the final judgment of the Supreme Court of the State of California herein to the Supreme Court of the United States for the reasons specified in the assignments of error and the statement of the basis of jurisdiction filed herewith, in order that the decision of the Supreme Court of the State of California may be examined and reversed; that an order be made fixing the amount of security which the petitioners, as appellants, shall give and furnish on said appeal; and that a transcript of the record, proceedings and papers herein, duly authenticated, be sent to the Supreme Court [fol. 136] of the United States, as provided by law.

Dated: January 15, 1942.

Alfred T. Cluff, Arch E. Ekdale, Attorneys for Petitioners and Appellants, C. J. Hendry Company, a corporation, and Frank Sematovich.

In Supreme Court of California

Order Allowing Appeal

The appeal prayed for is hereby allowed and cost bond on appeal fixed in the sum of $250.00.

Dated: January 19, 1942.

Gibson, Chief Justice of the Supreme Court of the State of California.

[fol. 137] [File endorsement omitted.]

[fol. 138] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENTS OF ERROR ON APPEAL TO UNITED STATES SUPREME COURT—Filed January 22, 1942

The appellants, C. J. Hendry Company, a corporation, and Frank Sematovich, assign the following errors in the record and proceedings in this cause:

1. The Supreme Court of the State of California erred in holding and adjudging that Section 845 of the Fish and Game Code of California was valid to confer jurisdiction upon the Superior Court of the State of California, in and for the County of Los Angeles, to hear and determine the [fol. 139] petition herein, and to adjudge and decree the forfeiture of the respondent net to the State of California.

2. The said Supreme Court erred in failing to hold and adjudge that the Superior Court was without jurisdiction of the subject matter of the proceeding herein; that under the Constitution and laws of the United States jurisdiction of said subject matter was vested exclusively in the district courts of the United States sitting in admiralty; and that Section 845 of the California Fish and Game Code was invalid to confer jurisdiction of said subject matter in the said Superior Court, and so applied was repugnant to the Constitution and laws of the United States.

3. The said Supreme Court erred in holding and adjudging that the proceeding in the Superior Court against the respondent net herein was "a traditional common law remedy" and a remedy saved to suitors in causes of admiralty cognizance by Sections 24 and 256 of the Judicial Code of the United States.

For which errors the appellants pray that the said judgment of the Supreme Court of the State of California, dated October 20, 1941, in the above entitled cause be reversed, and that a judgment be rendered directing the

[fol. 140] dismissal of the proceeding herein for lack of jurisdiction.

Dated: January 15, 1942.

Alfred T. Cluff, Arch E. Ekdale, Attorneys for Appellants, C. J. Hendry Company, a corporation, and Frank Sematovich.

[fol. 141] [File endorsement omitted.]

[fols. 142-143] Citation in usual form showing service on Eugene M. Elson filed Jan. 29, 1942, omitted in printing.

[fols. 144-153] Bond on appeal for $250.00 approved Jan. 19, 1942, omitted in printing.

[fol. 154] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY AND DESIGNATION OF PARTS OF THE RECORD—Filed April 13, 1942.

On their appeal to the Supreme Court of the United States herein, the appellants intend to rely upon the following points:

I

The cause of action herein is of maritime cognizance and the remedy sought was a remedy *in rem* against a *res* maritime. Jurisdiction of such a cause rests exclusively in the [fol. 155] United States District Courts, sitting in admiralty.

II

The remedy provided by Section 845 of the California Fish and Game Code, which was sought by the petitioners in this proceeding and adjudged to them by the California Superior Court, is not a "common law remedy" and is not within the exceptions of the saving clauses contained in Sections 24-(3), and 256-(3) of the Judicial Code of the United States.

The appellants hereby designate the following parts of the record, which they deem necessary for a consideration of the foregoing points:

1. Appellants' Jurisdictional Statement, with copies of the opinions of the state courts appended thereto. (R. 4).

2. Petition for Appeal and Order Allowing Same. (R. 77).

3. Assignments of Error. (R. 83).

4. Citation. (R. 88).

5. Statement Directing Attention to Rule 12 (3). (R. 92).

6. Appellants' Cost Bond on Appeal. (R. 201).

7. The following papers from the Clerk's Transcript in the Superior Court:

(a) The Petition. (R. 99).

[fol. 156] (b) Order for Hearing. (R. 117).

(c) Notice of Hearing. (R. 119).

(d) Affidavit of Posting Notice. (R. 124).

(e) Claim. (R. 121).

(f) Demurrer of Claimants. (R. 107).

(g) Answer of Claimants. (R. 104).

(h) Findings of Fact and Conclusions of Law. (R. 109).

(i) Judgment. (R. 113).

(j) Notice of Appeal. (R. 126).

8. The following portions of the Reporter's Transcript:

Testimony of L. G. Smith. (R. 135-66).

9. This Statement and Designation.

NOTE: Wherever it is consistent with the practice of the Court, will the Clerk please eliminate in the printed record all verifications (substituting the word "verified"), all proofs or acknowledgments of service (substituting therefor the words "affidavit of service" or "service acknowledged") and all duplications of captions.

Dated: April 3rd, 1942.

Arch E. Ekdale, Attorney for Appellants. Alfred T. Cluff, of Counsel.

[fol. 157] Service of the foregoing Statement and Designation is acknowledged this 7th day of April, 1942.

Earl Warren, Attorney General of the State of California. Everett W. Mattoon, Assistant Attorney General, By Eugene M. Elson, Deputy Attorney General. Per Ry.

[fol. 157a] [File endorsement omitted.]

[fol. 158] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—April 13, 1942

Appeal from the Supreme Court of the State of California

Treating the appeal papers herein from the Supreme Court of the State of California as an application for a writ of certiorari;

On Consideration Whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

Endorsed on cover: Enter Arch E. Ekdale. File No. 46,411. California Supreme Court. Term No. 1083. C. J. Hendry Company and Frank Sematovich, Petitioners, vs. E. C. Moore, I. Zellerbach and A. T. Jergens, as the Fish and Game Commission of the State of California. Filed March 30, 1942. Term No. 1083 O. T. 1941.

FILE COPY

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CHARLES ELMORE CROPLEY
Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~1083~~ 60

C. J. HENDRY COMPANY AND FRANK SEMATOVICH,
Appellants,

vs.

E. C. MOORE, I. ZELLERBACH AND A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

ALFRED T. CLUFF,
ARCH E. EKDALE,
Counsel for Appellants.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L. A. No. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners and Appellees,

vs.

PURSE SEINE NET, APPROXIMATELY 325 FATHOMS LONG, 32 FATHOMS DEEP, APPROXIMATE SIZE OF MESH FIVE TO EIGHT INCHES,
Respondent,

C. J. HENDRY COMPANY, A CORPORATION, AND FRANK SEMATOVICH,
Claimants and Appellants.

STATEMENT OF BASIS OF APPELLATE JURISDICTION IN UNITED STATES SUPREME COURT.
(Supreme Court Rule 12.)

I.

Statutory Provisions Believed to Sustain the Appellate Jurisdiction of the United States Supreme Court.

The appellants believe the jurisdiction of the United States Supreme Court to review this cause is primarily sustained by Judicial Code Section 237-a, being Section 344-a

of Title 28, United States Code, which provides that the Supreme Court may review, by writ of error, a final judgment of the highest court of a State in which a decision in the suit could be had—"Where there is drawn into question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

The appellants believe also the jurisdiction to review this cause is sustained by Subdivisions (b) and (c) of Section 237 of the Judicial Code, the former providing that it shall be competent for the Supreme Court to review by certiorari such final judgment, where there is drawn into question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where a right or immunity is specially set up or claimed by a party under the Constitution or Statutes of the United States, and the latter providing that if a writ of error be improvidently sought and allowed in a case where the proper mode of seeking review is by petition for certiorari, the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari.

The appellants also refer to the provisions of Sections 861-(a) and 861-(b) of Title 28 of the United States Code abolishing writs of error, substituting appeals therefor, and providing that the statutes regulating the right to a writ of error shall be applicable to the appeal substituted therefor.

II.

The State Statute Challenged and the Federal Enactment Affecting It.

Involved in this case is the validity of the remedial aspects of Section 845 of the Fish and Game Code of the

State of California as construed and applied herein. The text of the statute is:

> "*Seizure and sale of nets.* Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the commission. The commission must commence proceedings in the Superior Court of the county or city and county in which the seizure is made by petitioning said court for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for the hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the State Treasury to the credit of the fish and game preservation fund."

The State statute, as construed and applied herein, is claimed to be repugnant to Article III, Section 2, of the Constitution of the United States, providing that the judicial power of the United States shall extend to • • • "All cases of admiralty and maritime jurisdiction", and to those parts of Sections 24 and 256 of the Judicial Code of the United States as follows:

> "Section 24. The District Courts shall have original jurisdiction as follows:
>
> Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is com-

petent to give it. * * *" *(Sec. 41 (3) of Title 28, U. S. Code).*

"Section 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states:

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. * * *" *(Sec. 371 (3) of Title 28, U. S. Code).*

The appellants claim the State statute is repugnant to the Federal, constitutional and statutory provisions above quoted in that, as construed and applied herein, it purports to authorize a State court to proceed *in rem* in a cause of seizure and forfeiture of a thing maritime, following a seizure thereof on navigable waters, which necessarily involves the exercise of admiralty jurisdiction and the granting or withholding of an admiralty remedy—not a common law remedy, which alone is "saved to suitors" by the saving clauses in the acts of Congress above referred to.

III.

Dates of Entry of Judgment and of Application for Appeal.

The judgment appealed from was rendered and entered on October 20, 1941. A petition for rehearing was denied on November 18, 1941 and the remittitur to the trial court was issued November 21, 1941 (R. 198-9).

The application for this appeal was presented for allowance to the Chief Justice of the Supreme Court of California on January 19th, 1942 (R. 81).

The Supreme Court of the State of California is the highest court of the State in which a decision in the suit could be had. (Constitution of California, Art. VI, Sec. 2; 4.)

IV.

Nature of the Case.

A. Facts.

Certain waters of the Pacific Ocean adjacent to Catalina Island, Los Angeles County, California, within the territorial jurisdiction of the State, constitute Fish and Game District No. 20 (Fish and Game Code, Sec. 89), and in that district the taking of fish by net is unlawful (Fish and Game Code, Sec. 842). The fishing boat "Reliance" was a diesel powered purse seiner about 70 feet long (R. 11), and on June 18, 1936 she was equipped with a purse seine net (respondent herein) which was approximately 325 fathoms long and 32 fathoms deep, which was used by her in performing her function of fishing (R. 138).

On said day the vessel was boarded by State enforcement officers in the Pacific Ocean north of Catalina Island, and within Fish and Game District No. 20. Her net had been pursed, was partially aboard the vessel and partially in the water, and contained a quantity of blue fin tuna. An enforcement officer placed the master and crew under arrest, seized and tagged the net, and thereafter the net was carried to Los Angeles, where it was delivered to the Fish and Game Commission (R. 135-42). Thereafter the commissioners commenced this proceeding pursuant to Section 845 of the Fish and Game Code.

B. Proceedings Whereby the Federal Question Was Raised and Determined.

On June 24, 1936 the Fish and Game Commissioners filed in the Superior Court of the State of California, in and for the County of Los Angeles, the petition herein, alleging in substance that on June 18, 1936, in State waters within Fish and Game District No. 20, the respondent net was un-

lawfully used by one Jack Borich and other parties in violation of Section 842 of the Fish and Game Code; that a duly appointed enforcement officer then and there seized the net; that the same was a public nuisance; and praying the net be adjudged forfeited and ordered to be destroyed or sold (R. 99). In accordance with the directions of the statute (Sec. 845), a time for hearing was fixed by the clerk of the court (R. 117), and the statutory notices were timely and properly posted (R. 119-124).

Prior to the day set for hearing the appellants herein filed their claim as owners of the net (R. 121), and their demurrer to the petition upon the grounds (among others) that the petition failed to state facts sufficient to constitute a cause of action within the jurisdiction of the court, and that the court had no jurisdiction of the respondent net or of the subject of the action (R. 107), and their answer (R. 104). At the hearing, evidence of the facts above recited was given, decision on the issues of law raised by the demurrer was reserved, and after the issues of law and fact had been elaborately briefed and argued, the trial court gave its judgment, adjudging the net to be forfeited to the State of California (R. 113).

On the demurrer and final argument the appellants challenged the procedural aspects of Section 845 of the Fish and Game Code as invalid and repugnant to the provisions of the Constitution of the United States and acts of Congress above referred to, in that the statute purported to confer jurisdiction in the Superior Court to adjudge forfeiture of a thing maritime, part of the equipment of a vessel, and seized upon the navigable waters of the United States in a proceeding strictly *in rem;* and that the remedy purported to be afforded by Section 845 is an admiralty remedy and not a common law remedy which was saved to suitors in the saving clauses of the acts of Congress conferring exclusive jurisdiction in causes of admiralty and maritime

cognizance in the District Courts of the United States. The trial court rejected these contentions in a written opinion ante-dating the formal judgment, a copy of which is appended to this statement and marked "D".

A motion for a new trial was timely made by the appellants and denied by the trial court (R. 184-6).

The appellants duly appealed to the District Court of Appeal for the Second Appellate District (R. 126). The cause was thereafter transferred by that court to the Supreme Court (R. 190), and by the Supreme Court transferred for hearing and determination to the District Court of Appeal for the First Appellate District (R. 191).

The practice of raising questions for review on appeal by assignments of error does not prevail in California, the question involved in the appeal being required by the rules governing appellate courts to be set forth on the first page of the appellants' opening brief. (Rules of the Judicial Council for the Supreme and District Courts of Appeal, Rule 8, Section 2).

The Federal question presented on the appeal was stated in the appellants' opening brief as follows:

> "Does the Superior Court of the State of California have jurisdiction under Section 845 of the Fish and Game Code to entertain a proceeding *in rem*, commenced by the Fish and Game Commissioners, for the forfeiture of a fishing net seized by a game warden on board the vessel to which it belongs, in the navigable waters of the Pacific Ocean, within three miles of the state coast line?" (R. 192).

The District Court of Appeal determined the question in the affirmative, and rendered its opinion and judgment holding that the proceeding was within the jurisdiction of the Superior Court and was not within the exclusive jurisdic-

tion of the United States Courts. A copy of the opinion of the District Court of Appeal is appended to this statement and marked "C".

Before the judgment of the District Court of Appeal had become final, the appellants petitioned to the Supreme Court of the State of California for a hearing in that court, raising only the Federal question. The petition was granted and the cause transferred to the Supreme Court for hearing and determination (R. 194). After hearing, the Supreme Court rendered a judgment sustaining the contentions of the appellants, holding that the cause of action was of admiralty cognizance and, as a proceeding *in rem*, was exclusively within the original jurisdiction of the United States District Courts, and directing that the cause be remanded with instructions to dismiss the proceeding. A copy of the opinion upon which this judgment was based is appended hereto and marked "B".

Thereafter the appellees petitioned the Supreme Court for a rehearing, which was granted (R. 196), and after reargument and the filing of further briefs, the Supreme Court rendered its judgment, which is here sought to be reviewed, holding that the proceeding and remedy contemplated by Section 845 of the Fish and Game Code was a "traditional common law remedy", and as such within the saving clause of the acts of Congress. The judgment of the trial court was affirmed. A copy of the opinion on which the latter judgment is based is appended to this statement and marked "A".

A petition by the appellants for a further rehearing was denied (R. 198), and the last mentioned judgment of the Supreme Court became final.

That the Federal question was expressly raised in each of the above recited proceedings and expressly decided by the trial court, the intermediate appellate court and the

Supreme Court fully appears from each of the several opinions appended hereto.

As the challenge struck at the jurisdiction of the State court over the very subject matter of the petition, it follows that the Federal question was necessarily decided, and the jurisdiction could not have been sustained upon any adequate non-Federal ground.

V.

Basis of Appellate Jurisdiction in the Supreme Court of the United States.

Succinctly stated, the State statute, as applied herein, has been challenged as purporting to confer admiralty jurisdiction on a State court and to empower the State court to administer an admiralty remedy in a maritime cause of action. As jurisdiction in admiralty and the administration of remedies peculiarly of admiralty cognizance are conferred exclusively on the Federal courts by the paramount Federal law, it is obvious that the decision of the highest State court of jurisdiction upholding the validity of the statute so applied, as against the exclusive Federal grant, presents squarely a case within the literal terms of Judicial Code Section 237-(a). So applied, the State statute is palpably repugnant to the Federal enactments, unless the remedy authorized by the statute and administered in the State court can be brought within the exception of "a common law remedy where the common law is competent to give it", which is saved to suitors by the sections of the Judicial Code hereinabove referred to.

The cause of action herein is unmistakably civil and maritime, for it was a proceeding for forfeiture based upon seizure on navigable waters of a thing maritime,—part of the essential equipment of a fishing vessel. The Supreme Court of California so held in its final opinion herein, and

the correctness of that holding is confirmed by many decisions of the United States Supreme Court. See:

The Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196;
The Sarah, 8 Wheat. 391, 5 L. Ed. 644;
United States v. *LaVengeance*, 3 Dall. 297, 1 L. Ed. 610.

The proceeding contemplated by Section 845 of the Fish and Game Code and taken herein is a proceeding *in rem*, the prototype of which is the conventional suit *in rem* according to the course of the United States courts in admiralty. It is one essentially against the *res* itself as the debtor or offending thing, in which the *res* itself is seized and impleaded as the defendant, and is judged and sentenced accordingly. The statutory plan is that by virtue of dominion over the thing, all persons interested in it are deemed to be parties to the Superior Court proceeding. The decree purports to bind all the world, and under it the title and interests of all persons are affected, not merely the title or interest of a personal defendant. The proceeding meets all the tests of a proceeding *in rem* announced by the United States Supreme Court in:

Rounds v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303, 35 Sup. Ct. 596.

Each of the State courts which has passed upon this cause has held expressly or by necessary implication that the proceeding was strictly *in rem*, and the appellees have never suggested otherwise.

The validity of State statutes purporting to vest jurisdiction *in rem* in admiralty causes in the tribunals of a State has frequently been challenged by suitors on the grounds of repugnancy to the exclusive grant of admiralty jurisdiction in the United States courts, and the Supreme Court of the United States has not hesitated to exercise its jurisdiction on writ of error or appeal to review judg-

ments of the highest State courts of jurisdiction upholding the State statute so applied. In those cases the essential question for determination has been,—Can the remedy provided by the State statute be justified as a common law remedy within the meaning of the saving clauses?

The following cases are believed to sustain the jurisdiction on appeal of the Supreme Court of the United States as to this cause:

The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397.
The Ad. Hine, 4 Wall. 555, 18 L. Ed. 451.
The Glide, 167 U. S. 606, 17 Sup. Ct. 930.

In the above cases the precise question here involved was reviewed by the Supreme Court on writ of error to the highest State court of jurisdiction. The proceedings *in rem* purportedly authorized by State statutes were examined in the light of the saving clauses, and the statutes, to the extent that they purported to authorize the exercise of jurisdiction *in rem* in maritime causes, were held invalid.

More recently the Supreme Court has exercised its jurisdiction by writ of error to review the validity of a State industrial accident law as applied to maritime causes and as vesting original jurisdiction in the State Industrial Accident Commission.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 37 Sup. Ct. 524.

The right of review by appeal in the Supreme Court of the United States is not impaired by the possibility that Section 845 of the Fish and Game Code may have certain valid aspects. It is not disputed that the statute is valid in its substantive aspects, for it is unquestioned that a State has power to regulate fishing in its territorial waters. (*Manchester* v. *Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559-65). No doubt that power includes the power to declare forfeited or subject to forfeiture, property, maritime

and non-maritime, used in violation of its regulations; and in non-maritime causes, such as seizures on land, the procedural aspects of the statute do not run counter to the exclusive Federal grant of jurisdiction in admiralty causes.

But when the statute is resorted to, to justify the proceedings taken in a cause palpably maritime, the paramount Federal statutes come into play, and unless the statutory scheme can be justified under the saving clauses, the State statute "as construed and applied" is invalid.

A statute may be invalid as applied to one state of facts and yet valid as applied to another, and a litigant can be heard to question the statute's validity only when and so far as it is applied to his disadvantage.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106.

The case last cited is square authority supporting the appellate jurisdiction of the United States Supreme Court in this cause.

Counsel for appellants have made exhaustive study of the proper method of seeking this review, and upon the authorities above cited are convinced that the proper method is by appeal under Judicial Code Section 237-(a). But if any doubt should exist as to the right of review by appeal, there can be no doubt that the case is one which it is competent for the United States Supreme Court to review by writ of certiorari. The substance and importance of the question involved are sufficiently shown in the following subdivision, and if it should be held that review by appeal has been improvidently sought, it is respectfully urged that a review by certiorari should be granted under the provisions of Judicial Code Section 237-(c).

VI.

The Question Involved Is Substantial.

That the Federal question involved has substance is demonstrated by the evident difficulty which the Supreme Court of California had with it. The cause was twice heard by that court in bank, and the conclusion reached on the final hearing was directly opposite to that reached on the first hearing. It is interesting to note that each opinion received the concurrence of only four justices, the minimum number required for a judgment. There were several changes on the court between the hearings, and only one justice (the present Chief Justice) concurred in both judgments.

The final decision on the question is novel and revolutionary, for it directly holds that the proceeding *in rem* prescribed by the State statute is a "traditional common law remedy" and as such cognizable by State courts under the saving clauses (R. 41).

The soundness of that holding is the essence of the assignments of error herein, for in all other respects the Supreme Court, in both of its opinions, has held in accordance with the contentions of the appellants. Thus, it has recognized and held, expressly or by necessary implication, (1) that the cause of action was maritime; (2) that the proceedings taken under the statutory authority were proceedings *in rem;* and (3) that to escape the Federal ban upon the State court's jurisdiction, the remedy had to be a common law remedy which the common law was competent to give. Upon those premises the court held that the proceeding under Section 845 was a type of action cognizable in the common law courts of England at the time of the separation of the American colonies, and therefore was a common law remedy saved under the saving clauses.

This holding is startling when it is pointed out that in 1866 the Supreme Court of the United States held in *The Moses Taylor*, 4 Wall. 411; 18 L. Ed. 397, that a proceeding *in rem* was not a common law remedy but a civil law remedy, and was not within the contemplation of the saving clauses. That holding was unqualified and apparently left no room for an exception as to any sort of maritime cause,—contract, tort, petitory or possessory, penalty or forfeiture. The principle was reaffirmed or restated in a long line of cases involving maritime and non-maritime causes, so that for many years one of the fundamental tenets of the admiralty practitioner has been, "A state court cannot proceed *in rem* in a maritime cause".

The Ad. Hine, 4 Wall. 555; 18 L. Ed. 451.

The Glide, 167 U. S. 606; 17 S. Ct. 930.

Knapp-Stout & Co. v. *McCaffrey*, 177 U. S. 638; 20 S. Ct. 824-6.

Rounds v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303; 35 S. Ct. 596.

Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109-123; 44 S. Ct. 274-277.

The federal courts have been liberal in their construction of the saving clauses, but have rigidly held to the essential limitation that the clauses do not extend to remedies borrowed from a legal system other than the common law or novel remedies evolved to meet changing social conditions, such as the workmen's compensation scheme.

As was said by the Supreme Court in *The Moses Taylor, supra:*

> "It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

The scope and limitations of the saving clauses, as construed by the Supreme Court of the United States, was stated by Mr. Justice Brandeis in one of the most recent pronouncements as follows:

> "The 'right of a common-law remedy,', so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means *other than proceedings in admiralty* which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (Citing cases). *A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction.* (Citing cases). But otherwise the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit." (Italics supplied).
>
> *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109-123; 44 S. Ct. 274-7.

The final judgment herein, in the California Supreme Court, is, we believe, the first time that an appellate court, state or federal, has *consciously* made an adjudication to the effect that there is an exception to *The Moses Taylor* rule in causes of maritime forfeitures. If that exception is valid, it necessarily follows that in forfeiture cases under state laws, any state is free to authorize its courts to proceed *in rem* against a vessel or any part of her equipment, from the net or tackle of an insignificant fishing craft to the entire structure and appurtenances of the largest vessel afloat, and divest the title of all interests therein, be the holders innocent or guilty.

It is submitted that such a concept is revolutionary, and it is of manifest public importance that the existence or

non-existence of any such qualification on *The Moses Taylor* rule should be determined by the highest judicial authority.

It is submitted that the state Supreme Court seriously erred in holding the statutory remedy to be traditionally of common law cognizance. The following points, which the appellants will urge for reversal of the judgment, are suggested:

1. Because in 1660 or earlier, the Parliament of England enacted statutes providing for a type of forfeiture different from the conventional common law forfeiture (which followed conviction or attainder of a person), the Supreme Court has assumed that all remedies which might have been available to enforce or vindicate rights under those statutes became remedies cognizable at common law. It has overlooked that the law of England was not exclusively common law. Included therein was a great jurisprudence based on the civil law, written and unwritten, administered in the ecclesiastical courts, the admiralty courts and on the revenue side of the court of the exchequer by processes and remedies unknown to the common law, and which the judges of the common law courts were prone to view with abhorrence.

2. Such a remedy was the proceeding *in rem*. It was and is entirely foreign to any concepts of common law jurisdiction, and was strictly a civil law remedy, administered only in the courts of civil law jurisdiction,—the admiralty and the revenue side of the exchequer.

The Palmyra, 12 Wheat. 1; 6 L. Ed. 531-5.
The Moses Taylor, supra.

3. The vindication of rights under the statutory forfeitures provided in the Seventeenth Century Navigation Acts, such as *12 Car. II, Ch. 18*, was evidently cognizable in any jurisdiction in England where a remedy appropriate to the particular circumstances was available, but always

within the limitations of the jurisdiction selected and by the process which the courts of such jurisdiction were capable of affording. By the statute of *12 Car. II*, captors and informers are authorized to sue for their interests "*in any court of record* by bill, information, plaint or other action." There is also an express provision for condemnation in admiralty (the admiralty court was not recognized as a court of record), following a seizure by a naval commander. A proceeding by bill or plaint connotes a remedy at common law or equity; an information connotes a proceeding in a court administering civil law, and no doubt referred to the informations on the revenue side of the exchequer courts referred to by Judge Story in *The Palmyra, supra.* It is evident that the statute was designed to make available to the suitor an election of remedies according to the common law practice or that of the civil law, as he might deem most appropriate.

4. The cases construing he statute, cited in the opinion of the Supreme Court, do not sustain the view that the statutes created or sanctioned a proceeding *in rem* in common law causes. On the contrary, both cases are conventional common law actions against personal defendants. *Roberts* v. *Withered*, 5 Mod. 193; 12 Mod. 92, was a simple action in detinue, whereby an informer sought to recover from a defendant in possession the property alleged to have been forfeited. *Wilkins* v. *Despard*, 5 Durnf. & East's Rep. 112 was an action in trespass by the owner of forfeited property against a captor in possession. Nothing remotely akin to a proceeding *in rem* was anywhere involved.

5. The California Supreme Court has failed to distinguish between matters of substance and matters of remedy. No doubt the Navigation Acts did provide for a new type of forfeiture,—one which became effective as to the passage of title by operation of law upon the commission of the

offense. That is the substantive aspect. Its remedial aspect is simply the pointing out of various proceedings in courts administering the civil law and others administering the common law, but it did not purport to enlarge or detract from the conventional remedial jurisdiction of any system or court. Thus, if a suitor could vindicate his right under the statute by a personal judgment against a defendant within reach of process, a common law action of replevin, detinue or trespass was appropriate. If it was necessary to vindicate the right by a seizure, condemnation and sale, the only adequate remedy was the proceeding *in rem* cognizable exclusively in the admiralty or the exchequer.

6. The saving clauses in the acts of Congress defining the admiralty jurisdiction do not purport to save a remedy "according to the laws of England". That would include civil as well as common law remedies. They save only common law remedies.

7. Statutory forfeitures have been common in England for centuries, and in the United States and the several states since the foundation of the republic. Since the Judicature Act in England and at all times in American jurisdictions, practically all remedies are administered by courts of general jurisdiction, which also administer the common law. Many of these statutes specifically authorize proceedings *in rem* in such courts to enforce or vindicate the forfeiture. But that does not change the essential character of a remedy *in rem* from a civil law remedy to a common law remedy. It is not a remedy in courts of general jurisdiction or in common law courts which was saved, but a *common law remedy*.

The Moses Taylor, supra.

8. Since 1789 original jurisdiction of all causes of seizure and forfeiture under the laws of the United States, mari-

time or non-maritime, has been vested in the district courts, which sit as courts of admiralty, equity and common law. The essential test of admiralty jurisdiction in forfeiture cases is whether the seizure took place on land or on navigable waters. If, as has been held herein, a proceeding *in rem* for forfeiture is a traditional common law remedy, it is obviously immaterial where the seizure took place, for all seizures for forfeiture would be of common law cognizance and the remedy a common law remedy, in which causes suitors are guaranteed a right of trial by jury by the federal Constitution. Yet the United States Supreme Court has held time and again that if the seizure is on the navigable waters, the cause is of admiralty cognizance, triable only on the admiralty side of the district courts, and that in such causes (unlike causes based on land seizures) the right of trial by jury does not inhere.

The Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196;
Armstrong's Foundry v. *United States*, 6 Wall. 766, 18 L. Ed. 882;
The Sarah, 8 Wheat. 391, 5 L. Ed. 644;
The Betsy and Charlotte, 4 Cranch. 443, 2 L. Ed. 673;
United States v. *LaVengeance*, 3 Dall. 297, 1 L. Ed. 610.

It is submitted, the question presented in this appeal has substance and the appeal has merit.

Respectfully submitted,

ALFRED T. CLUFF,
ARCH E. EKDALE,
Attorneys for Appellants, C. J. Hendry Company, a Corporation, and Frank Sematovich.

APPENDIX "A".

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

In Bank.

L. A. 16192.

Filed Oct. 20, 1941.

E. C. Moore, I. Zellerbach, A. T. Jerdens, as the Fish and Game Commission of the State of California, *Petitioners and Appellees,*

vs.

Purse Seine Net, Approximately 325 Fathoms Long, 32 Fathoms Deep; Approximate Size of Mesh Five to Eight Inches, *Respondent;*

C. J. Hendry Company, a Corporation, and Frank Sematovich, *Claimants and Appellants.*

California law enforcement officers seized a large purse seine fishing net in use on the fishing boat "Reliance" in navigable waters of the Pacific Ocean adjacent to Catalina Island. The taking of fish by net within these waters is unlawful. (Fish and Game Code, sec. 842). The California Fish and Game Commission filed a petition in the Superior Court asking for a judgment to declare the net a public nuisance forfeited to the State, and to order its destruction or sale under the provisions of section 845 of the Fish and Game Code. A judgment of forfeiture issued from which the owners of the net have appealed. They do not challenge the power of the state to enact legislation regulating fishing within territorial waters and providing for the forfeiture of nets used in an illegal manner, but they contend that the state court has no jurisdiction to proceed in the action because it is a maritime cause of action within the exclusive admiralty jurisdiction of the federal courts.

Section 9 of the Judiciary Act of 1789 and later statutes re-enacting the same provision (Judicial Code, secs. 24 (2),

636; 28 U. S. C. A. 41, subd. 3, 371) provide that the federal district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." (See The Moses Taylor, 4 Wall. 411). The present proceeding involves a maritime cause of action. If the property proceeded against if an integral part of the vessel or its equipment and is seized on navigable waters the cause is maritime. (Turner v. U. S., 27 Fed. (2d) 134; The Buffalo, 148 Fed. 331; The Witch Queen, 30 Fed. Cas. 396.) This fact alone, however, does not establish that the action is within the exclusive jurisdiction of the federal courts. The saving clause of the Judiciary Act makes it clear that a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued is traditionally within the jurisdiction of the common law courts. Even though the right to sue is created by a recently enacted state statute, it is within the saving clause so long as the remedy is of a type recognized at common law (Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109), including equity. (Knapp-Stout & Co. v. McCaffrey, 177 U. S. 638).

If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the Federal admiralty courts to entertain the action. (Reynolds v. Steamboat Favorite, 10 Minn. 100, 193; N. J. Steam Nav. Co. v. Merchant's Bank, 6 How. 344, 390; Percival v. Hickey, 18 Johns (N. Y.) 257; 1 Kent Com. 367, 377; 1 Story, Constitution, 533. See Am. Steamboat Co. v. Chase, 16 Wall. 522; Sherlock v. Alling, 93 U. S. 99; Fisher v. Boutville Trans. & Towing Co., 162 Fed. 904; International Nav. Co. v. Lindstrom, 123 Fed. 475; The Harrisburg, 119 U. S. 213; The Hamilton, 207 U. S. 398; Aurora Shipping Co. v. Boyce, 191 Fed. 966.) "The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in a common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away." (Benedict, Admiralty (5th ed.) sec. 23. See Knapp-Stout & Co. v. McCaffrey, supra; Red

Cross Line *v.* Atlantic Fruit Co., supra.) The fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (See The Sarah, 8 Wheat. 391; U. S. *v.* The Betsy and Charlotte, 4 Cranch 433; The Confiscation Cases, 7 Wall. 454; U. S. *v.* La Vengeance, 3 Hall 297; U. S. *v.* Grundy, 3 Cranch 337; The Palmyra, 12 Wheat. 1) does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy.

It is therefore necessary to determine whether this forfeiture proceeding by the state is the type of action which was cognizable in a common law court. In 1789 when the Judiciary Act was enacted there had been little development of the common law in federal or state courts of the United States. An examination of the English common law as it existed before that time must therefore be made.

In determining the jurisdiction of the English common law courts, acts of Parliament defining that jurisdiction must be taken into account. It is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament. (Martin *v.* Superior Court, 176 Cal. 289; People *v.* Richardson, 138 Cal. App. 404). Other jurisdictions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies from the Mother Country in 1776 are included within the English common law. (See cases cited in 78 U. of Pa. L. Rev. 195; 11 Am. Jur. 166; 22 L. R. A. 508, et seq.)

Appellants' contention that the present proceeding is of a type unknown to the common law courts because it is an action in rem against the net itself rather than in personam against the owners of the net is unsound. While it is true that actions in common law courts are usually in personam as contrasted to the in rem proceedings of the courts of the Admiralty, it has long been established that an action in rem can be brought by the State in an ordinary common law court for the forfeiture of goods or articles used in viola-

tion of laws imposing such a penalty even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes. The Statute of 12 Car. II, c. 18 (7 English Statutes at Large) enacted in 1660 provided that all imports to and exports from England and its possessions must be in English ships "under the penalty of the *forfeiture and loss of all the goods and commodities* which shall be imported into or exported out of any the aforesaid places in any other ship or vessel, *as also of the ship or vessel, with all its guns, furniture, tackle, ammunition and apparel;* one third part thereof to his Majesty, his heirs and successors; one third part to the governor of such land, plantation, island or territory where such default shall be committed, in case the said ship or goods be there seized, or otherwise that third part also to his Majesty, his heirs and successors; and the other third part to him or them who shall seize, inform or *sue for the same in any court of record,* by bill, information, plaint or other action, wherein no essoin, protection or wager of law shall be allowed;". (Italics added.) This statute, providing for the institution of forfeiture proceedings in any court of record against ships and cargoes used in violation of the act clearly authorized a remedy by forfeiture in the common law courts. In the case of Roberts *v.* Withered (1696) 5 Mod. 193; 12 Mod. 92; L. Salk 223, it was held that in proceeding to forfeit a ship and cargo under the above act, an action of detinue would properly lie in the court of the King's Bench. "* * * for My Lord Coke (b) was of the opinion, that the bringing a replevin is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the act, the property is divested out of the former owners; and by this action now brought, it is vested in the plaintiff, and therefore he may bring detinue for it." This decision was approved in Wilkins *v.* Despard, 5 Durnf. & East's Rep. 112.

Such forfeiture to the State of illegally used articles has continued as an accepted common law procedure. The statute of 13 & 14 Car. II. c. 7, 11, 18, 20 (8 English Statutes at large) provided for the forfeiture in common law courts of various articles used in violation of law, certain types of vessels being included in chapter 11. The Customs Consolidation Act of 1876 (39 & 40 Vict. c. 36) imposes, as part

of the penalty for smuggling, forfeiture to the Crown of the goods smuggled and the *ship, boat,* carriage, or horse used for their conveyance. Chapter 36, par. 218 of the act provides: "All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts * * * may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the *High Court of Justice in England, the superior courts of common law* at Dublin or Edinburgh * * * or by information in the name of some officer of Customs or Excise, before *one or more justice or justices* in the United Kingdom, the Isle of Man, or the Channel Islands * * *." (Italics added.) (See 9 Halsbury's Laws of England 377; Fraizey *v.* Charlton (1920) 1 K. B. 147.) While this statute is of recent origin, it indicates that at the present time in England forfeiture proceedings against vessels and cargo are instituted in common law courts rather than courts of admiralty. (See also Dangerous Drugs Act, 1920, 10 & 11 Geo. 5, c. 46, s. 14 as amended, 1923; 13 & 14 Geo. 5, c. 5, s. 2 (1); 22 Halsbury's laws of England 399).

In the United States the federal government from early times has provided for the forfeiture of certain articles used in violation of law. (See 14 Stat. L. 156; 14 Stat. L. 151, 165; 13 Stat. L. 240; 14 Stat. L. 178; 12 Stat. L. 319; The Sarah, 8 Wheat. 391. See also Internal Revenue Code secs. 3720 et seq., 2154, 2155 et seq.; 26 U. S. C. A. 339, 552, 553; 19 U. S. C. A. 1088.) California has likewise exacted forfeiture of various illegally used articles. (Pen. C. sec. 325 (1872); Health and Safety Code secs. 12304-5 (former Stats. 1887, ch. 95, p. 110); Health and Safety Code sec. 11610.) The early federal statutes required that in the trial of cases involving seizures made on waters navigable by vessels of ten tons burden and upward the court sit as a court of admiralty (See The Sarah, supra; Reynolds *v.* Steamboat Favorite, supra, 193), but the federal cases themselves recognize that such forfeiture proceedings constituted a valid remedy at common law. Thus, in the case of The Palmyra, supra, Mr. Justice Story stated: "It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown * * * In the contemplation of the common law the offender's right

was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing." (See U. S. *v.* 5 Boxes of Asafoetida, 181 Fed. 561; The Sarah, supra.)

There are cases which state that an in rem action against a vessel is not a common law remedy and is therefore within the exclusive admiralty jurisdiction of the federal courts. (The Moses Taylor, supra; The Ad. Hine *v.* Trevor, 4 Wall. 555; The Glide, 167 U. S. 606; The Belfast, 7 Wall. 624.) These cases, however, were concerned with types of in rem proceedings that were foreign to the common law. They are authority for the rule that a state court can have no jurisdiction over an action in rem against a vessel when such action has no counterpart in the common law courts. (See Knapp-Stout & Co. *v.* McCaffrey, supra.) But these cases are not controlling in circumstances where the common law provided an analogous remedy. As stated by the Supreme Court of Minnesota in Reynolds *v.* Steamboat Favorite, supra: "In England in the court of exchequer, and in the United States in the district courts in seizures made on land for violation of the revenue laws, the proceedings are in rem, according to the course of the common law. Though a proceeding is in rem, it is not necessarily a proceeding or cause in admiralty. The Sarah, 8 Wheat. 391; United States *v.* 422 Casks of Wine, 1 Peters, 547; L. Kent Comm. 374-5-6."

The courts of other jurisdictions with statutes similar in nature to the one now under consideration have enforced such forfeitures under the assumption that they had jurisdiction to do so. (See State *v.* Umaki, 103 Wash. 232; State *v.* Mavrikas, 148 Wash. 651; Sterrett *v.* Gibson, 168 S. W. (Tex. Civ. App.) 16, aff'd 172 S. W. 1198. See also Mirkovich *v.* Milnor, 34 Fed. Supp. 409; Dick *v.* Anderson, 57 Cal. 251.) In the case of The Bessie Mac, 21 Fed. Supp. 220, a federal district court held that forfeiture proceedings under a Washington statute similar in nature to that of California were maritime in nature and should therefore be

brought in a federal court. The court, however, failed to consider whether such proceedings, though maritime, constituted a common law remedy within the saving clause of the Judiciary Act.

It is therefore clear that the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act. (Red Cross Line *v.* Atlantic Fruit Co., supra.)

Appellants contend that the petition for forfeiture filed by the Fish and Game Commission did not allege that the purse seine net in question was used for the taking of fish and therefore failed to state a cause of action. The petition stated, however: "That said purse seine net • • • is and was at all times herein mentioned an appliance used for the taking of fish" and "was • • • used in violation of the provisions of Section 842 of the Fish and Game Code of the State of California." This constitutes a sufficient allegation that the net was illegally used to catch fish.

Since the judgment of forfeiture in the instant case pronounced the net in question a public nuisance pursuant to section 845 of the Fish and Game Code which declares any net used in violation of law to be a public nuisance, the action is one to abate a nuisance and therefore within the appellate jurisdiction of the District Courts of Appeal. (Cal. Const. Art. 6, sec. 4 b.) Although the original appeal was improperly transferred to this court by the District Court of Appeal of the Second Appellant District, this court on November 20th, 1939, transferred the cause to the District Court of Appeal of the First Appellate District. The case is now here by virtue of an order granting a hearing after decision by that court. This court therefore has jurisdiction for all purposes. (Cal. Const. Art. 6, sec. 4 c).

The judgment is affirmed.

TRAYNOR, J.

We Concur:

GIBSON, C. J.
CURTIS, J.
CARTER, J.

APPENDIX "B".

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

L. A. No. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, *Petitioners and Respondents*,

vs.

PURSE SEINE NET, approximately 325 fathoms long, 32 fathoms deep, approximate size of mesh five to eight inches, *Respondent*,

C. J. HENDRY COMPANY, a corporation, and FRANK SEMATOVICH, *Claimants and Appellants.*

In a statutory proceeding, a large purse seine net was adjudged forfeited to the Fish and Game Commission of the State of California because of a use which the court found was unlawful. The appellants were the owners of the net at the time it was seized.

The facts are undisputed, and the only question for decision is whether the court had jurisdiction to entertain the proceeding. The appellants do not challenge the state's power to regulate fishing in its territorial waters, to close certain waters to fishing with nets, and to provide by law for the forfeiture of nets used in violation of its regulations. But they contend that as the present proceeding is one *in rem* against a thing maritime seized in navigable waters, the federal courts have exclusive jurisdiction.

When seized the net was being used by the purse seine fishing boat *Reliance*, on which it belonged in fishing operations. It is conceded that the boat was then within waters in which the taking of fish by net was unlawful.

The Fish and Game Commission filed its petition in the Superior Court reciting these facts and asking for a judgment declaring the net to be a public nuisance, forfeiting it, and ordering its destruction or sale. Upon the filing

of this petition, the court ordered public notice of the time and place of its hearing to be given. On the day fixed, the appellants appeared and filed their claim as owners of the net. The judgment of forfeiture followed.

The principal contention of the appellants is that as the thing seized was part and parcel of a ship, the Superior Court has exercised admiralty jurisdiction in a proceeding *in rem* brought to accomplish a maritime forfeiture of a maritime object in accordance with the conventional procedure of courts of admiralty. This, they say, constitutes an invasion of the exclusive province of the United States courts upon whom admiralty jurisdiction is conferred by the Constitution of the United States and the acts of Congress. In support of the judgment, the respondent insists that as the state may validly legislate to protect fish and game, its courts may enforce the penalties of a statute enacted for that purpose.

In any maritime case there are two fields in which conflict may occur between the laws and judicial proceedings of a state and those of the United States. The first is in the field of substantive law. A state may not constitutionally adopt and enforce laws which materially interfere with the harmony and uniformity of the maritime law in its international and interstate relations, or which contravene a paramount act of Congress. This is not a conflict of jurisdiction and the question concerns only substantive law.

But conflict may occur in another field. As admiralty jurisdiction is vested exclusively in the courts of the United States, no state court may conduct proceedings according to the course of admiralty or administer admiralty remedies. Its proceedings are limited to those cognizable at common law.

In this case the appellants do not claim that there is any conflict between the substantive provisions of the California Fish and Game Code, under which the proceeding was brought, and maritime law. But lack of conflict in this regard is not determinative of the case, for jurisdiction in admiralty depends upon maritime subject-matter and not upon the source or character of the substantive law which is being administered. If the property proceeded against

is a thing maritime and the place of seizure is on navigable waters, the cause is clearly within the maritime jurisdiction, and it is immaterial whether the substantive law which authorizes the forfeiture is a law of the United States or of a state.

Admittedly the net in this case was seized upon navigable waters. The vessel from which it was taken was engaged in fishing, and the net was a part of her equipment. If it was necessary to the ship's enterprise and indispensable for the accomplishment of the objects of the particular voyage, it was, in legal contemplation, a part of the vessel, although it was not required for navigation. (*Turner vs. United States*, 1928 A.M.C. 1089, 27 F. (2d) 134; *Buffalo*, 148 Fed. 331; *Edwin Post*, 11 Fed. 602; *Witch Queen*, 30 Fed. Cas. 396.)

The true criterion by which to determine whether any vessel or its appurtenances is subject to admiralty is the business or employment for which it is intended, or may be used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion. "If the business or employment of vessels appertain to travel, or trade and commerce on public navigable water, it is sufficient and the jurisdiction attaches." (*General Cass*, 10 Fed. Cas. 169, 170; *E. M. McChesney*, 8 Fed. Cas. 668; *Alabama*, 22 Fed. 449; *City of Pittsburgh*, 45 Fed. 699; *Public Bath No. 13*, 61 Fed. 692; 1 Benedict, *Admiralty*, 5th ed., p. 2.)

A fishing vessel leaves the mainland with her hatches empty and navigates to a place where the fish are abundant. She is then maneuvered so that the net encircles a school of fish. The fish are drawn aboard and transported back to land. This transportation is as essential a part of the fishing business as is the pursing and hauling in of the net and is certainly an activity in aid of trade and commerce. It is an essential step in getting the fish to market. Hence, at the time the net here in controversy was seized, it was a part of the appurtenances of the *Reliance*, or, to use the phraseology of the American admiralty, a part of her "tackle, apparel and furniture". In legal contemplation it was a part of the vessel itself, just as were her engines, her stores and her navigation equipment, and a subject of admiralty jurisdiction.

However, a further question must be answered. Is this proceeding one which may be prosecuted in a state court?

Although by the Constitution of the United States, the jurisdiction of admiralty causes is vested in the federal courts (art. III, sec. 2), by statute there is saved to suitors "the right of a common-law remedy where the common law is competent to give it" (28 Mason's U. S. C., sec. 371). But a decree *in rem* is not a remedy which the common law is competent to give; it is authorized only by the civil law. The Constitution "only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute." (*Moses Taylor*, 71 U. S. 411.)

This rule was followed and applied in California as early as 1871 (*Crawford vs. The Bark Caroline Reed*, 42 Cal. 469). Later in *Fischer vs. Carey*, 173 Cal. 185, jurisdiction of an action for partition of a vessel was disclaimed, although it was one in equity against a personal defendant. The court pointed out that although the action was personal in form, in substance it was a suit *in rem*, and any decree of the court would act directly upon the vessel by taking it into the custody of the court, through a receiver, and ordering a sale. This was held to be an invasion of the exclusive jurisdiction of the courts of admiralty. To the same effect is the case of *Glide*, 167 U. S. 606, where the court decided that although a state may enact a law providing for a lien against a ship, it may only be enforced in a federal court of admiralty. And in a more recent consideration of the rule as it applies to facts substantially identical with those now before the court, the conclusion was reached that a state court has no jurisdiction in a proceeding brought for the forfeiture of a fishing boat for violation of a state law. In that case the facts showed that the boat was seized upon the charge of fishing without a license. The director of fisheries of the State of Washington filed a petition in the

Superior Court of that state praying for the confiscation and forfeiture of her engines, tackle, apparel, furniture, equipment, and seine net. The state court was denied jurisdiction (*Bessie Mac.*, 1938 A. M. C. 77, 21 F. Supp. 220).

The respondent relies on *Smith v. Maryland*, 59 U. S. 71, where, it is true, the court held that a state law did not conflict with the jurisdiction of admiralty. But this case has been overruled by the later decisions which are directly to the contrary. It was pointed out in the *Glide case, supra*, that the question whether a claim of a maritime nature could be enforced in the state courts by process *in rem* under a state statute creating a right in the thing itself was not brought to the court directly until the cases of the *Moses Taylor, supra*, and *Hine vs. Trevor*, 71 U. S. 555. In the first, it was determined that a suit against the vessel or thing is a proceeding *in rem* and is not a remedy afforded by the common law, hence, the admiralty court had exclusive jurisdiction. Later in the same term, the court in *Hine vs. Trevor, supra*, decided that as the vessel was sued in a state court for a tort arising from a collision, the judgment should be reversed and remanded with directions to dismiss for want of jurisdiction. The remedy pursued, said the Court, partook of all the essential features of an admiralty proceeding *in rem* which is in no sense a common-law remedy so as to come within the exemption of the law which "saves to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

For these reasons, the judgment must be reversed with directions to the Superior Court to dismiss the proceeding. As one acknowledged authority upon admiralty law has written, "The right to proceed *in rem* is the distinctive remedy of the admiralty and hence administered exclusively by the United States courts in admiralty: no state can confer jurisdiction upon its courts to proceed *in rem*, nor could Congress give such power to a state, since it would be contrary to the constitutional grant of such power to the Federal Government." (1 Benedict, *Admiralty*, 5th ed., sec. 23.) See, also, *Knapp, Stout & Co. vs.*

McCaffrey, 177 U. S. 638; *Crawford v. Bark Caroline Reed*, *supra*.

It is so ordered.

EDMONDS, J.

We Concur:
GIBSON, C. J.
SHENK, J.
McCOMB, J. pro tem.

APPENDIX "C".

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO.

Civil No. 11319.

Filed Jan. 31, 1940.

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners and Respondents,

vs.

PURSE SEINE NET, Approximate Length 325 Fathoms, Approximate Depth 32 Fathoms, Approximate Size of Mesh 5 to 8 Inches, Respondent.

C. J. HENDRY COMPANY, a Corporation, and FRANK SEMATOVICH, Claimants and Appellants.

The petitioners sued to have adjudged forfeited to the State Fish and Game Commission a purse seine net used by the owners unlawfully for fishing in the waters of the state. The petitioners had their judgment.

The single question stated by appellants in their opening brief is whether the state courts have jurisdiction of the proceeding. Asserting that the fishing net was a part of the "apparel and furniture" of a sea going vessel, the appellants advance the argument that the federal courts alone have jurisdiction of such forfeiture proceedings. Section 845 of the State Fish and Game Code provides for

proceedings in the state superior courts leading to the forfeiture, sale or destruction of nets in violation of the terms of the code. No provision is made for such proceedings in the federal courts, hence, the question here is whether the code sections are constitutional. Appellants concede the state's power to regulate and control fishing and to forfeit the net, but they state that the forfeiture is a "cause of admiralty cognizance", and hence, that the state courts have no jurisdiction. The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397, and similar cases are cited holding that maritime contracts and torts are exclusively within maritime jurisdiction. We do not find that any of these cases have any bearing upon the question before us. The controlling authority is Smith *v.* Maryland, 59 U. S. 71, involving a state statute providing for the forfeiture of a scoop or drag used for catching oysters within state waters. The point involved was whether the statute conflicted with the federal jurisdiction in admiralty. At page 76 the court says: "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in United States *v.* Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." To the same effect are Manchester *v.* Massachusetts, 139 U. S. 240, 260; and Miller *v.* McLaughlin, 281 U. S. 261, 74 L. Ed. 840. This language is found on page 264 of the latter decision: "The claim under the 14th Amendment is also groundless. A state may regulate or prohibit fishing within its waters. (Manchester *v.* Massachusetts, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559 • • • and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instru-

ments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor." (Citing cases).

The supreme power of the state to regulate and control fishing within its territorial waters cannot be denied. Bayside Fish Flour Company *v.* Gentry, 297 U. S. 422, 80 L. Ed. 772.

For these purposes the state has policing jurisdiction of these waters, and to accomplish the end may enact such reasonable police regulations as it may deem proper. Thus the state may prohibit the use of dynamite or fire arms for taking fish within its waters, and may seize and confiscate such articles if necessary to make its regulations effective. The code sections fixing the procedure for the forfeiture of nets unlawfully used in fishing within its territorial waters are justified upon the accepted doctrine that the power to make regulations includes the power to enforce them. In such legislation there is no conceivable conflict with the admiralty jurisdiction of the United States.

It is argued that the petition is insufficient because it does not specifically allege that the net was used "in taking fish." The charging part of the petition is that it was used "wilfully and unlawfully * * * contrary to the provisions of the existing statutes * * * in violation of the provisions of section 842 of the Fish and Game Code * * *." This is not a criminal proceeding. The pleading meets all the requirements of section 845 of the Fish and Game Code. The petition acquainted the owners with the nature of the proceeding. It also stated the date and place of the alleged violation, the statute claimed to have been violated, and the character of the relief sought, namely, the forfeiture of the net. Such notice was all that the statute required. People *v.* One 1933 Plymouth Sedan, 13 Cal. (2d) 565, 569.

There is no merit in the contention that this court is without jurisdiction to hear the cause. The appeal was taken to the district court of appeal of the second appellate district. That court, deeming that the cause was in equity, transferred it to the supreme court. That court transferred the cause here for determination. The appellant now con-

tends that the cause is not one in equity, that jurisdiction of the appeal lay in the district court of appeal of the second district, and that its transfer by that court to the supreme court was therefore void. Under section 4c of Article VI of the constitution the supreme court has power to transfer any cause "pending" before it, or any cause "pending before a district court of appeal" to any other district court of appeal for hearing and decision. Under section 4a a district court may transfer a cause to the supreme court if the appeal was not taken to the "proper" court. Hence, if the order of transfer from the district court to the supreme court was void because the cause was not in equity, then the order was ineffective and the cause was still "pending" in the district when transferred here by the supreme court. If that transfer was not void, but voidable by error, it has become valid by the lapse of the sixty day period. If the original transfer to the supreme court was valid, then, too, the transfer here from the latter court was in accord with the constitutional provision. Any descriptive matter in the order of transfer is immaterial so long as the cause is identified and the purpose of the order is within the court's jurisdiction.

The judgment is affirmed.

NOURSE, P. J.

We concur:

STURTEVANT, J.

SPENCE, J.

APPENDIX "D".

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

No. L. B. C. 7558.

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, *Petitioners*,

vs.

PURSE SEINE NET, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, *Respondent*,

C. J. HENDRY COMPANY, a corporation, and FRANK SEMATOVICH, *Claimants*.

On the question of fact raised in this proceeding, I am forced to the conclusion that the net in question was actually used in Fish and Game District 20 in violation of the Fish and Game Code.

After studying the very complete and able briefs filed by claimant, and the cases cited, I am of the opinion that the remedy provided in section 845 of the Fish and Game Code of the state, is not within the exclusive jurisdiction of the Admiralty Court of the United States, and that it is not a void exercise of the legislative power of the state of California.

The authority of the state to make laws regulating and protecting fish within the jurisdictional limits of the state is not questioned, but it is seriously and ably contended that the remedy for enforcing forfeiture of the net used in violation of such police law is within the exclusive jurisdiction of the United States. I cannot agree with such contention.

I cannot see anything more involved here than the right of the state to enforce a violation of its laws by a civil action *in rem*, provided by the legislature. The mere fact that the forfeiture sought to be enforced is directed against an object which might be made the subject of the maritime and

admiralty jurisdiction does not make a statutory cause of action to enforce the provision of the state law, a proceeding in admiralty.

A proceeding *in rem*, and this is clearly that, is not within the exclusive jurisdiction of the admiralty courts, even though in some particulars the machinery used is identical.

Such a remedy did not originate with the admiralty courts, but was adopted from the civil law. It is not a remedy afforded by the common law, but when used to enforce a right not maritime in its nature it is a remedy given by statute. (*The Moses Taylor*, 71 U. S. 411, 431; *The Hine v. Trevor*, 71 U. S. 555, 567.) In my opinion the case of *Smith* v. *Maryland*, 59 U. S. 71, cited by petitioners is applicable and binding here. The laws of Maryland cited there created a remedy against the boat itself, if it was used in violation of the law, and the forfeiture of the boat, under such remedy was held not to conflict with the admiralty jurisdiction of the United States.

I see no merit in the other points raised by claimant. In view of the foregoing, judgment will be given as prayed. Attorney for petitioners will prepare findings.

Dated: August 17, 1936.

HARRY R. ARCHIBALD,
Judge.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1942

No. 60

C. J. HENDRY COMPANY and FRANK SEMATOVICH,
Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California.

BRIEF FOR PETITIONERS.

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IN THE

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No. 60

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Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California.

BRIEF FOR PETITIONERS.

Official Reports of Opinions Herein.

The opinions delivered in the courts below were officially reported as follows:

A. The opinion of the Supreme Court of California now under review [R. 41-47] in 18 Cal. (2d) 835.

B. The opinion of the Supreme Court of California on the first hearing [R. 36-40] in 105 Pac. (2d) 919.

C. The opinion of the California District Court of Appeal, after which a hearing in the Supreme Court was granted [R. 32-5] in 98 Pac. (2d) 766.

D. The opinion of the trial court is not reported, officially or otherwise, but appears in the record herein at page 7.

In the state courts the case was entitled: E. C. Moore, I. Zellerbach, A. T. Jergens, as the Fish and Game Commission of the State of California, *Petitioners* and *Appellees*, v. Purse Seine Net, approximately 325 fathoms long, 32 fathoms deep, approximate size of mesh five to eight inches, *Respondent*; C. J. Hendry Company, a corporation, and Frank Sematovich, *Claimants* and *Appellants*.

Grounds on Which Jurisdiction of This Court Is Invoked.

The jurisdiction of this court is invoked upon the following grounds:

1. The cause is one wherein there was drawn into question the validity of a statute of the State of California on the grounds of its being repugnant to the Constitution and laws of the United States, and the decision of the highest state court was in favor of its validity.

Judicial Code, Sec. 237a; 28 U. S. C. A. 344a.

2. The cause is one wherein there was drawn into question the validity of a statute of said state on the grounds of its being repugnant to the Constitution and laws of the United States, and one in which a right and immunity are specially set up by the petitioners under the laws of the United States.

Judicial Code, Sec. 237b; 28 U. S. C. A. 344b.

3. The Supreme Court of California has decided a substantial Federal question, in a way not in accord with the applicable decisions of this Court.

Rules of the Supreme Court, Rule 38 (5)a.

Statement of the Case.

Section 845 of the Fish and Game Code of the State of California provides as follows:

> "*Seizure and sale of nets.* Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the commission. The commission must commence proceedings in the Superior Court of the county or city and county in which the seizure is made by petitioning said court for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for the hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the State Treasury to the credit of the fish and game preservation fund."

Fish and Game District No. 20 consists of certain navigable waters of the Pacific Ocean adjacent to Catalina Island. These waters are within the state's territorial jurisdiction, and in them it is unlawful to take fish by other means than by hook and line. (Fish and Game Code; Secs. 89, 842.)

The fishing boat RELIANCE was a diesel powered purse seiner about 70 feet long [R. 18] and was equipped with the purse seine net named as respondent in the proceedings commenced herein, with which she performed her function of fishing [R. 18]. On June 18, 1936, she was boarded by California enforcement officers while she was lying in the said navigable waters off Catalina Island and within Fish and Game District No. 20 [R. 17]. The respondent net had been pursed, was partially on board the vessel and partially in the water, and contained a quantity of blue fin tuna [R. 14, 15]. One of the enforcement officers arrested the RELIANCE'S master and crew, seized and marked the respondent net, and caused it to be taken to Los Angeles, where he delivered it to the Fish and Game Commissioners [R. 16].

On June 24, 1936, the Fish and Game Commissioners filed in the Superior Court of the State of California, in and for the County of Los Angeles, the petition in this proceeding [R. 1], alleging in substance that the net had been unlawfully used in the prohibited waters; that a duly qualified enforcement officer then and there seized the net and retained possession thereof, and that the same was and is a public nuisance. The prayer was that the net be adjudged forfeited and ordered destroyed or sold. Pursuant to the procedural scheme of the state statute (*Sec. 845, supra*), the clerk fixed a time and place for hearing the petition [R. 2], and the notices provided by the statute [R. 3] were timely and properly posted [R. 4].

Prior to the day set for hearing the petition, the petitioners here, owners of the seized net, filed their claim thereto [R. 4], their demurrer to the petition, challenging, among other things, the jurisdiction of the court over the net and the subject matter of the petition [R. 5], and their answer [R. 6]. After hearing, the trial court gave its judgment, adjudging the net to be forfeited to the State of California [R. 10]. A written opinion of the trial judge dealt principally with the question here under review [R. 7].

The cause, on appeal, was heard first by the District Court of Appeal, and twice by the Supreme Court of the State of California. The District Court of Appeal affirmed the judgment below [R. 32]. The Supreme Court took jurisdiction upon petition for hearing after judgment in the District Court of Appeal [R. 35], and in its first opinion [R. 36] reversed the judgment below and ordered the proceeding dismissed for lack of jurisdiction. On rehearing, that judgment was discarded and the judgment below finally affirmed [R. 41]. Certiorari was granted by this court to review the last mentioned judgment [R. 54].

Specification of Errors Intended to be Urged.

These petitioners at all times opposed the jurisdiction of the trial court in this proceeding on the ground that the cause of action was maritime and of admiralty cognizance; that the proceeding provided by the state statute and taken in the trial court was the conventional proceeding *in rem*, according to the course of the civil law; and that the State of California was without power to vest its courts with such jurisdiction under the Federal Constitution and those familiar sections of the Federal Judicial Code which vest in the District Courts of the United States exclusive jurisdiction of causes of admiralty and maritime jurisdiction, "saving to suitors, the right of a common law remedy where the common law is competent to give it."

Constitution of the United States, Art III, Sec. 2;

Judicial Code, Sec. 24 (3); U. S. C. A., Tit. 28, Sec. 41 (3);

Judicial Code, Sec. 256 (3); U. S. C. A., Tit. 28, Sec. 371 (3).

In both of its opinions the Supreme Court has upheld the petitioners' views that: (1) the cause of action herein was maritime and of admiralty cognizance; (2) the proceeding contemplated by the state statute was a proceeding *in rem*; and (3) except as to *common law remedies*, the state courts were without jurisdiction and the state legislature without power to confer such jurisdiction upon them.

In the first opinion [R. 36], written by Mr. Justice Edmonds, the state Supreme Court held that the remedy con-

templated by Section 845 of the Fish and Game Code was not a common law remedy which was saved to suitors and might be sought in the jurisdiction of the state courts, but was a remedy authorized only by the civil law, and was not a remedy which the common law was competent to give. The order was that the proceeding be dismissed.

On the rehearing the court reiterated its holding that the cause was maritime and of admiralty cognizance, but held that a proceeding *in rem in forfeiture* cases was a "traditional common law remedy" at the time of the separation of the American Colonies, and, therefore, the statutory proceeding was in substance a remedy which "the common law was competent to give" within the meaning of the saving clauses.

The essential point upon which the petitioners assert error is, therefore, a very narrow one, and is whether or not the court was right in holding that a proceeding *in rem* such as is provided in the involved California statute is a remedy which "the common law is competent to give."

That is the gist of our third and last assignment of error [R. 51], which is as follows:

> "3. The said Supreme Court erred in holding and adjudging that the proceeding in the Superior Court against the respondent net herein was 'a traditional common law remedy' and a remedy saved to suitors in causes of admiralty cognizance by Sections 24 and 256 of the Judicial Code of the United States."

Our first and second assignments of error [R. 51] are:

"1. The Supreme Court of the State of California erred in holding and adjudging that Section 845 of the Fish and Game Code of California was valid to confer jurisdiction upon the Superior Court of the State of California, in and for the County of Los Angeles, to hear and determine the petition herein, and to adjudge and decree the forfeiture of the respondent net to the State of California.

"2. The said Supreme Court erred in failing to hold and adjudge that the Superior Court was without jurisdiction of the subject matter of the proceeding herein; that under the Constitution and laws of the United States jurisdiction of said subject matter was vested exclusively in the district courts of the United States sitting in admiralty; and that Section 845 of the Fish and Game Code was invalid to confer jurisdiction of said subject matter in the said Superior Court, and so applied was repugnant to the Constitution and laws of the United States."

The petitioners will urge all three of their assignments, but it will be at once apparent that a presentation of the specific (third) assignment will reach the more general assignments, for the specific error is the root of all.

Summary of Argument.

In each of its opinions the California Supreme Court has correctly held or recognized:

That the net proceeded against was part of the equipment of a vessel; a necessary adjunct to the performance of the vessel's maritime function, and as such, in contemplation of law, as much a maritime *res* as the vessel itself.

That the proceeding authorized by the California statute and by which the net was condemned as forfeited was a proceeding *in rem*, the substantial equivalent of the proceedings of the federal courts in admiralty causes.

That as the seizure was on the navigable waters of the Pacific Ocean, the cause of action attempted to be asserted in the state Superior Court was a cause within the admiralty and maritime jurisdiction.

That the 24th and 256th sections of the United States Judicial Code vest jurisdiction of causes within admiralty jurisdiction exclusively in the District Courts of the United States sitting in admiralty, saving to suitors only the right of a common law remedy where the common law is competent to give it.

This court, in *The Moses Taylor* and many other cases, has held that a proceeding *in rem*, the substantial equivalent of the admiralty proceeding *in rem*, is not a common law remedy, but a civil law remedy, and as such is not within the saving clauses; and that jurisdiction to administer such a remedy is exclusive in the federal courts sitting in admiralty. That rule applies to all proceedings *in rem* in causes of admiralty cognizance.

The case of *Smith v. Maryland*, insofar as it implies that a state court may proceed *in rem* in a cause of mari-

time forfeiture, is contrary to the principle of *The Moses Taylor* rule, and can no longer be regarded as authoritative.

The judgment of the California Supreme Court under review holds that a proceeding *in rem* in causes for forfeiture under statutory authority was a "traditional common law remedy" within the meaning of the saving clauses, and as such may be administered within the jurisdiction of a state court. This holding is unsound because:

The existence of a statutory remedy in the laws of England prior to the separation of the American Colonies does not mean that the statute was exclusively, or at all, of common law cognizance.

The English law, and particularly its laws relating to remedies, historically included both common law and civil law remedies, and its judicial system included courts for the administration of common law and civil law remedies.

The statutes of England referred to in the Supreme Court's opinion created a new type of forfeiture, distinguishable from the ancient common law forfeiture of the property of a convicted felon, whereunder the forfeiture came about by operation of law directly upon the happening of the offense.

These statutes, in their substantive aspects, were of universal cognizance, and all courts, whether of common law or of civil law, were bound to give them effect.

But the statutes contemplated that in administering remedies, each court should proceed within the limitations of its own jurisdiction and process. They did not enlarge the remedial cognizance or jurisdiction of the common law, but contemplated only the conventional common law

remedies in a common law court, and civil law remedies in a court of civil law jurisdiction.

The California court failed to distinguish between substantive rights and burdens created by the statutes, and the remedies by which the rights were intended to be enforced.

The common law cases in England show that jurisdiction at common law was never asserted to adjudge any right or redress any wrong under these statutes, except by conventional common law process and by a judgment which operated only *in personam*, and no case suggests that a common law tribunal in a common law cause ever attempted to give a judgment *in rem*.

In England, only the courts of civil jurisdiction,—admiralty and the revenue side of the exchequer, had or asserted the power to afford remedies *in rem* in forfeiture cases.

On principle and upon authority of this court, a proceeding *in rem* in any cause is not a common law remedy but a civil law remedy, and is not saved to suitors by the Judicial Code.

It is not a remedy in common law courts which is saved, but a *common law remedy*.

The Court of Exchequer on its revenue side was not even a court of common law jurisdiction.

The attempt to qualify *The Moses Taylor* rule by excluding its operation in forfeiture causes is unsound.

If the rule be so qualified, it will destroy the uniformity and harmony of admiralty procedure and ultimately lead to the upsetting of the entire admiralty jurisdiction.

Argument.

A word of explanation may not be amiss to justify the order of our presentation in the following argument.

Our attack on the jurisdiction of the state court in this case was, of course, based upon the rule of *The Moses Taylor*, 4 Wall. 411, and the long line of cases in accord with it. The state Attorney General defended the jurisdiction by arguing: (1) that the principles of *The Moses Taylor* did not extend to forfeiture cases, and (2) that the cause of action was non-maritime. The idea that the remedy provided by Section 845 of the California Fish and Game Code was a "traditional common law remedy," recognized as such in England at the time of the separation of the American Colonies, was not advocated by the Attorney General at any stage of these proceedings. It was born, we believe, of the independent researches of the learned Justice who wrote the last opinion of the state Supreme Court, and we believe the Attorney General was as surprised as we were when that idea appeared in the court's opinion.

We presume that the Attorney General will attempt to sustain the judgment by a defense of the proceeding as a "traditional common law remedy," but we believe he will also rely for affirmance on the two other grounds which he has heretofore advocated.

In each of its opinions the state Supreme Court accepted our contention that the proceeding herein was in all essence a proceeding *in rem*, rooted in the civil law, and that the cause of action was maritime. It also held with us, by necessary implication, on the proposition that *The Moses Taylor* rule had no inherent limitations which

would render it inapplicable to forfeiture cases. In the light of the probability of attack upon those propositions, it seems desirable that the first subdivision of our argument be devoted to a brief demonstration that those preliminary propositions were correctly determined by the court. This will involve some discussion of *The Moses Taylor* case and of some of the cases which follow it. As this court has not examined *The Moses Taylor* rule for some years, such discussion may not be entirely without value.

This order of presentation was forecast in our statement of points to be relied upon [R. 52].

I.

The Cause of Action Is of Maritime Cognizance and the Remedy Sought Was a Remedy in Rem Against a Res Maritime. Jurisdiction of Such Causes Rests Exclusively in Admiralty.

A.

The Cause of Action Was Maritime and of Admiralty Cognizance.

The gravamen of this action was the seizure by municipal authority of a fishing boat's net on the high seas for alleged violation of a state enacted fishing regulation. The regulation was one which the state had power to make and power to enforce. One of the means of enforcement provided by the state statute was the *seizure* of the offending thing, to be followed by judicial proceedings, looking to an adjudication of forfeiture.

The offending thing was the net by which the vessel Reliance performed its maritime function. Without its purse seine, a vessel such as the Reliance cannot fish and

her utility is suspended. The net, in view of the law, is a part of the vessel itself, and partakes of its character as a thing maritime.

Although this proposition has never been seriously disputed by the Attorney General, we refer, without discussion, to the following authorities, many of which were cited by the state Supreme Court in each of its opinions herein:

The Dundee, 1 Hag. Ad. 109, aff'd *sub. nom.*;
Gale v. Laurie, 5 Barn. & C. 156;
Turner v. United States, 27 Fed. (2d) 134;
The Gaston, 25 Fed. (2d) 461;
The Buffalo, 148 Fed. 331;
The Witch Queen, Fed. Cas. No. 17916;
Haynie's Case, 1931 A. M. C. 381.

The net admittedly was seized upon the navigable waters of the Pacific Ocean. The state enforcement officer boarded the RELIANCE in such waters while she was actually engaged in fishing with the net, and took it into custody.

We therefore have the conjunction of a maritime *res* and a maritime *situs* of the seizure, which make the cause of action a cause of admiralty cognizance. This proposition is elementary, and has been sustained by the highest authority since the earliest days of the Republic.

United States v. La Vengeance, 3 Dall. 297;
The Sally, 2 Cranch. 406;
The Betsy and Charlotte, 4 Cranch. 443;
The Sarah, 8 Wheat. 391;
Armstrong's Foundry v. United States, 6 Wall. 766;
The Confiscation Cases, 7 Wall. 454.

It was suggested in the arguments in the state court proceedings that the regulation of fishing by a state in its territorial waters was not a matter of admiralty cognizance, wherefore a forfejture case for breach of such a regulation must be a non-maritime cause. If it were a material factor we could present a convincing argument to the effect that the entire subject of the regulation of fishing in navigable waters is inherently maritime in character, and causes involving fishing regulations are of admiralty cognizance, in principle and historically. But such a discussion, however interesting, has no place in this case, for it does not affect the character of the cause of action, whether the municipal law said to have been violated is maritime or non-maritime. The gravamen of the cause of action is not the *offense* but the *seizure*. An action for forfeiture is not criminal. It is a civil action, petitory in character, and its essence is to *vindicate the seizure*.

The right of a sovereign authority to seize property, either within its jurisdiction or on the high seas, rests upon the sovereign's municipal laws or upon its belligerent rights under the laws of war. The adjudication which follows the seizure is to determine whether or not the seizure was lawful. If it was not lawful it is tortious, and in either event the decree will so determine. The cause of action sounds essentially in tort, and determines the civil rights and liabilities brought into existence by the act of seizure, which is lawful or tortious as the court shall decide.

The test of jurisdiction in such and in any case of tort is the situs of the act complained of or sought to be vindicated; and if the act occurs with respect to a maritime *res* on the navigable waters, the gist of the action is *maritime tort* and within the jurisdiction of admiralty.

"Every violent dispossession of property on the ocean is *prima facie* a maritime tort; as such, it belongs to the admiralty jurisdiction."

Mr. Justice Johnson in *L'Invincible*, 1 Wheat. 238-257.

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, *including captures jure belli, and seizures on water for municipal and revenue forfeitures.*" (Italics supplied.)

Mr. Justice Clifford in *The Belfast*, 7 Wall. 624-37.

"A seizure is an assertion of title in the government and the subsequent proceedings in court are proceedings to try the title so asserted. When the object of such seizure is a ship, the subsequent proceeding is in substance a petitory suit, and within the admiralty and maritime jurisdiction of the United States."

Benedict. J., in *The Missouri*, Fed. Cas. No. 9652, at page 481.

"The court considers the law as completely settled by the case of The Vengeance. . . . It is the place of seizure, and not the place of committing the offense, which decides the jurisdiction. . . ."

Chief Justice Marshall in *The Betsy and Charlotte*, 4 Cranch. 443.

The gist of the action in this cause was to try the legality of the act of the state's enforcement officers in seizing the respondent net from the RELIANCE on the navigable waters. That act dealt with a maritime *res*, and had a maritime *situs*. The essential cause of action was maritime and of admiralty cognizance.

This argument might be greatly expanded and a multitude of other authorities cited. But the principle is clear and was accepted by the state Supreme Court in each of its opinions herein. It held in both opinions that the cause of action herein was of admiralty cognizance.

It was vigorously urged in the state courts that the State of California might enforce its "police regulations" in its own courts by any appropriate means. So it may. But when its police regulations confer a right in a maritime *res*, and the state attempts to assert that right on the navigable waters by a seizure, it engages in a maritime transaction, and jurisdiction of courts in such transactions is fixed by dominant federal law. Appropriate means are those which are appropriate to causes of admiralty cognizance. A state which engages in a maritime transaction is in no better position with respect to jurisdiction than the United States or a private citizen.

B.

THE PROCEEDINGS TAKEN IN THIS CAUSE WERE PROCEEDINGS IN REM. THE REMEDY SOUGHT AND ADJUDGED WAS A REMEDY IN REM.

> "The proceeding *in rem* which is in the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing, all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it, the property itself passes and not merely the title or interest of a personal defendant." (Citing cases.)

Mr. Justice Hughes in *Rounds v. Cloverport Foundry*, 237 U. S. 303-6.

It can hardly be disputed that the proceeding authorized by Section 845 of the Fish and Game Code, and the proceeding by which this net was adjudged to be forfeited by the Superior Court, fall squarely within that definition. The seized net was personified and sued as a sentient being, and it alone was adjudged and sentenced. The proceeding named no personal defendants whose titles or interests were attacked, and the judgment or decree purports to bind all the world.

The statutory proceeding has its prototype in the conventional admiralty suit *in rem* and the steps in each are parallel from beginning to end. There is a seizure or arrest, and a taking of the *res* into custody,—then a monition or posted notice to all the world,—and an invitation, expressed or implied, for all interested persons to appear and defend or be forever foreclosed. Finally, and after hearing, there is a judgment, operating directly upon the *res*, and binding all the world, including persons not in court, as well as those who have appeared, and a condemnation of the *res* to sale or destruction.

The statutory proceeding is patently and unmistakably the conventional civil law proceeding *in rem*, and all of the state courts' decisions herein have accepted it as such. We do not understand the final judgment of the state Supreme Court as denying that character, but only to hold that such a civil law proceeding became engrafted into the common law of England by statutory enactment. That aspect we shall cover in our second subdivision.

If it be accepted that the cause of action is maritime, and the proceeding and remedy are *in rem*, we have a case wherein *The Moses Taylor* rule is of vital importance.

C.

Examination of The Moses Taylor Rule.

In the year 1867 this court had before it, on writ of error from a court of the State of California, the case of *The Moses Taylor*, 4 Wall. 411, wherein, by a statutory proceeding of which the conventional *in rem* proceeding in admiralty was the prototype, a vessel had been proceeded against to enforce a state created lien in favor of an injured passenger. This court held that the remedy *in rem* which the state enactment purported to provide was not a remedy cognizable by the common law, but a remedy of civil law cognizance, and as such was not within the exceptions of the saving clauses of Sections 24 and 256 of the Judicial Code. The court said:

> "The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title, made under its decrees, validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.
>
> "The statute of California, to the extent in which it authorizes actions *in rem* against vessels for causes

of action cognizable in the admiralty, invests her courts with admiralty jurisdiction, and so the Supreme Court of that state has decided in several cases. In Averill v. The Steamer Hartford, 2 Cal. 308, the court thus held, and added that 'the proceedings in such actions must be governed by the principles and forms of admiralty courts, except where otherwise controlled or directed by the act.' (pp. 427-8.)

"The case before us is not within the saving clause of the 9th section. That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute." (p. 431.)

The judgment against the vessel was reversed and the cause ordered dismissed for lack of jurisdiction in the state court.

This case was followed during the same time by *The Ad. Hine v. Trevor*, 4 Wall. 555; 18 L. Ed. 451, wherein a state court had sought to enforce against a vessel, by proceeding *in rem*, a state created lien for collision damage. Again this court denied the jurisdiction of the state courts, saying:

"But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even

mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That, after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the western states.

"While the proceeding differs thus from a common law remedy, it is also essentially different from what are in the west called suits by attachment, and in some of the older states foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common-law court of the state.

"Such actions may, also, be maintained *in personam* against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the 9th section of the judiciary act.

"But it could not have been the intention of Congress, by the exception in that section (*sic*), to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the federal courts would be defeated. (pp. 571-2.)

The two cases above referred to were the first pronouncements of this court pointing out the exclusive character of the jurisdiction of the federal courts in admiralty in proceedings and causes *in rem*, and effectually checked a purported and growing admiralty jurisdiction in state courts under the purported authority of the procedural lien laws of the several states. California, which prior to *The Moses Taylor* decision had held that its statutes authorized a proceeding *in rem* "governed by the principles and forms of admiralty courts". (*Averill v. The Steamer Hartford*, 2 Cal. 308), quickly fell into line with the rule in *The Moses Taylor*, and repudiated any such jurisdiction in its courts. (*Crawford v. The Bark Caroline Reed*, 42 Cal. 469.)

The Moses Taylor and *The Ad. Hine* dealt with tort liens which existed by virtue of the general maritime law, but the doctrine of exclusive jurisdiction in admiralty was soon extended to cover maritime contract liens which had no existence in the general maritime law, and owed their existence to state statutes.

Thus in *The Glide*, 167 U. S. 606, a Massachusetts statute had purported to create a maritime lien upon a vessel for supplies and repairs furnished in her home port, which lien was not permitted by the general maritime law as it then existed. Means were provided in the enactment for the enforcement of the lien by proceedings *in rem* in the state courts. This court held that the *creation* of the lien was a valid exercise of state legislative power, for, as Congress had not undertaken to legislate with respect to such liens, a state might properly do so. But, this

court held, the *enforcement* of such a lien was a matter of admiralty cognizance, and it could only be enforced *in rem*, in an appropriate proceeding in a federal admiralty court. This court said:

"In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful: (1) For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. (2) For repairs and supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute. (3) Whenever the statute of a state gives a lien, to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. (4) This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty. The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts

of the United States have jurisdiction, *and exclusive jurisdiction*, to enforce that right according to their own rules of procedure. 148 U. S. 1, 11-13, 13 Sup. Ct. 500." (pp. 621-2.) (Italics supplied.)

In *Knapp Stout & Co. v. McCaffrey*, 177 U. S. 638, the doctrine of *The Moses Taylor* was examined in its application to a state court proceeding to foreclose a *possessory* lien, based upon a maritime subject matter, and there the doctrine was held not to apply, as the proceeding was not *in rem* but *in personam*. Mr. Justice Brown pointed out the essential distinction, saying:

> "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in the admiralty, and the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, or if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute of a common law remedy." (p. 648.)

Reference should also be made to *Rounds v. Cloverport Foundry Co.*, 237 U. S. 303, and to *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, wherein Mr. Justice Brandeis wrote the most recent pronouncement of this court as to the scope and limitations of the saving clauses:

> "The 'right of a common-law remedy,' so saved to suitors, does not, as has been held in cases which

presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means *other than proceedings in admiralty* which may be employed to enforce the right or to redress the injury involved. It includes remedies *in pais*, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (Citing cases.) *A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction.* (Citing cases.) But otherwise the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents as it sees fit." (Italics supplied.) (pp. 123-4.)

See also:

1 *Benedict Admiralty*, 6th Ed., Chap. 4, pp. 33-42.

In the state courts the Attorney General claimed that *The Moses Taylor* rule was limited to cases of maritime liens based upon contract and tort, and did not include seizure and forfeiture causes. No such qualification on the doctrine of *The Moses Taylor* case can be found in or inferred from any pronouncement of this court, nor is any other qualification or limitation placed upon it. The rule is flatly and unqualifiedly that *no proceeding in rem* may be entertained by a state court in a cause of admiralty cognizance, and no remedy *in rem* afforded.

We can think of no principle or reason which would call for or justify an exception as to any sort of proceeding *in rem*, and certainly none has ever been suggested. We are confident, therefore, that the rule of *The Moses Taylor* applies in any cause of admiralty cognizance, whether it

sound in contract or in tort, or be invoked to enforce a maritime lien or vindicate a maritime title or a maritime right. If the cause is maritime and the proceeding *in rem*, any court but a federal court of admiralty is without jurisdiction.

D.

The Authority of Smith v. Maryland in the Light of The Moses Taylor Rule.

It has been observed by this court that the exclusive character of the admiralty jurisdiction *in rem* was never brought to the attention of the court until the term of 1866, although prior to that time several of the states had, by statute, created various rights *in rem* in things maritime, and provided for their enforcement by suits *in rem* in state courts.

The Glide, 167 U. S. 606-15-16;

Knapp Stout & Co. v. McCaffrey, 177 U. S. 638.

In 1855, twelve years before the decision in *The Moses Taylor*, this court had before it the case of *Smith v. State of Maryland*, 18 How. 71. A fishing boat had been seized by a sheriff and adjudged forfeited by a state justice of the peace, for alleged violation of a state statute prohibiting the taking of oysters in territorial waters, which was forbidden, and forfeiting to the state the vessel employed therein.

In this court the state statute and proceeding in the state court were challenged as repugnant to the commerce clause and to the admiralty and maritime jurisdiction clause of the federal constitution.

This court held that as the state retained title to its submarine soil, in trust for the common enjoyment of

public rights, including the right of taking fish and shell fish, and might regulate the modes of such enjoyment to prevent the destruction of the fishing, and such regulation was not in conflict with but in furtherance of public rights, such regulation, even to the extent of providing for forfeiture of offending vessels, was not repugnant to the commerce clause.

As to the constitutional provision extending the judicial power of the United States to all causes of admiralty and maritime jurisdiction, the court said, on the authority of *United States v. Bevans*, 3 Wheat. 386, that this clause did not affect the jurisdiction nor the legislative power of the states over its territorial waters, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. Then, without further discussion, the court said:

> "As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever, we are of opinion that it is not repugnant to this clause of the constitution." (p. 76.)

The sections of the Judicial Code upon which *The Moses Taylor* decision was based, were not mentioned or apparently considered by the court.

In the trial court herein, and in the District Court of Appeal, *Smith v. Maryland* was held to be decisive of the case at bar, and *The Moses Taylor* and the cases following it were said to be without bearing on the question involved [R. 7, 33]. The Supreme Court in its first opinion said that later decisions of this court, directly to the contrary, had overruled *Smith v. Maryland* [R. 39], and that statement was not criticized in the second opinion.

The statement of the California Supreme Court that *Smith v. Maryland* had been overruled, taken without the background of the issues litigated in this cause, is a little sweeping, for undoubtedly there are several points in *Smith v. Maryland* which are entirely sound today. The court undoubtedly meant that to the extent that the decision directly or indirectly sanctioned a proceeding *in rem* in a state court to accomplish a forfeiture based on maritime seizure, it had been overruled by *The Moses Taylor* and the later cases herein discussed.

To that extent the California Supreme Court is right, for on the question of state jurisdiction *in rem* the implications of *Smith v. Maryland* cannot be squared with the pronouncements in *The Moses Taylor*, *Ad. Hine v. Trevor* and the later cases.

The Moses Taylor rule was novel and revolutionary, and this court, later, had occasion to comment, as indicated in the first paragraph of this subdivision, that the "exclusive of admiralty jurisdiction *in rem*" had not theretofore been brought to its attention.

Smith v. Maryland undoubtedly will be relied upon in opposing counsel's argument in this court, but, we submit, the case is no longer authority sanctioning state court jurisdiction in any cause of maritime seizure.

A word may be in order concerning other causes in seizure and forfeiture, wherein *The Moses Taylor* rule has been overlooked. Some of them are cited in the last decision of the California Supreme Court [R. 46, fol. 126]. Characteristic of these is the first case cited, *State v. Umaki*, 103 Wash. 232. It is evident from the report that neither court nor counsel realized that the question was in the case. The same is true in *Mirkovich v. Milnor*,

34 Fed. Supp. 409, where, however, the point was not directly involved.

The extent and limitations of the admiralty jurisdiction, and the possibilities of infringement by state courts, are questions which come within the experience of only a small proportion of the general bench and bar, and it is not surprising that most cogent points are frequently overlooked.

On the other hand, forfeiture causes have been examined in the light of *The Moses Taylor* rule by several of the inferior federal courts, and conclusions in accordance with the rule have invariably been reached.

The most recent case is *The Bessie Mac* (W. D. Wash.), 21 Fed. Supp. 220. A fishing vessel and her net were seized by state authorities under a Washington statute in all essential respects the equivalent of the California statute here involved. The authorities filed a "petition" in the state Superior Court for a decree of forfeiture. The owner filed a possessory suit *in rem* in admiralty in the United States District Court, in which the state authorities appeared and moved to dismiss the cause, claiming the right to proceed under the state statute *and in the state court*. The District Court denied the motion, holding that the exclusive jurisdiction of the cause was in admiralty. *The Moses Taylor* and the other cases herein discussed were cited as authority.

The Bessie Mac was accepted as an authority in support of the California Supreme Court's first decision [R. 39], but was rejected in the second decision on the ground that the court had "failed to consider that the proceedings, though maritime, constituted a common law remedy within the saving clause of the Judiciary Act" [R. 46].

The Elezena (E. D. Va.), 53 Fed. 359, involved libels in admiralty by materialmen and seamen against a vessel which had previously been declared forfeited by decree of a Virginia state court for violation of oyster taking laws. The claimants were the purchasers at the state forfeiture sale. The former owners were not before the admiralty court and their interests were not involved.

The court held that the state court proceedings were incapable of divesting the rights of prior maritime lienors, despite unequivocal terms of the statute providing for the cutting off of the rights of all persons. The court said:

> "The states in ceding, by the constitution, to the judicial power of the United States the cognizance of 'all cases of admiralty and maritime jurisdiction,' retained no part of the jurisdiction, civil or criminal; and when Congress created certain courts as admiralty courts, the admiralty jurisdiction passed exhaustively to them by virtue of the constitution, and it was unnecessary for Congress to enact in express words, as it did, that this jurisdiction in civil causes should be exclusive. The jurisdiction *in rem* belonging to admiralty courts, that is to say, the power to deal with ships by name as sentient beings, irrespectively of ownership, or other condition or circumstance,—belongs exclusively and peculiarly to the admiralty, and cannot be conferred, either for civil or criminal purposes, by state legislation, upon the common law courts of a state, so as to operate in derogation or exclusion of the power of the admiralty to enforce maritime liens in due course of admiralty procedure.
>
> "In evasion of these settled principles, it avails nothing to contend that the police laws of a state are superior to them." (p. 365.)

That is clearly and unmistakably *The Moses Taylor* rule, although that case is nowhere mentioned in the opinion.

We have found no appropriate case, whether of seizure and forfeiture or otherwise, where *The Moses Taylor* rule has been brought to the attention of the court and has been disregarded. We submit it cannot be disregarded in this case.

II.

The Remedy Provided by the California Statute Is Not a Common Law Remedy, Such as Is Saved in Admiralty Causes by the United States Judicial Code.

In both opinions, the California Supreme Court accepted as sound the propositions discussed in the foregoing subdivision, except that in the last opinion a qualification was sought to be added to *The Moses Taylor* rule; which is that the rule does not apply in proceedings *in rem* in forfeiture causes.

It was held that a proceeding *in rem* for forfeiture of things maritime, contrary to proceedings *in rem* to enforce other maritime rights, was a "traditional common law remedy," and as such within the saving clauses of the Judicial Code. In forfeiture cases, says the court,—there are concurrent remedies *in rem* in admiralty and at common law!

The basis of this extraordinary and startling pronouncement seems to be that the researches of the author of the court's last opinion have disclosed: (1) that statutory forfeitures have been part of the law of England, at least since the seventeenth century; (2) that the Court of

King's Bench, and other courts exercising common law jurisdiction, have adjudicated rights under these forfeiture statutes; and (3) both in England and this country, courts of general jurisdiction have taken jurisdiction of proceedings *in rem* for forfeiture. From these premises the court concluded that the entire forfeiture scheme, substantive and remedial, became a part of the common law of England, prior to the separation of the American Colonies, and all remedies appropriate thereto became and are remedies of common law cognizance.

Examination of these premises will demonstrate that none of them will support the conclusion on principle or authority.

The opinion states that the common law of England, as adopted in the courts of American states, includes not only the unwritten law of England, but also the Acts of Parliament enacted prior to the separation. This is true, but to a very qualified extent. The constitutions or the legislatures of many states have provided, and the courts have held that the rule of decision in matters not covered by local statute, shall be the common law of England, and that, it frequently has been held, includes certain Acts of Parliament which deal with subjects of the common law, substantive and remedial.

But it by no means follows that every act of Parliament dealt with common law subject matter or became, even in England, a part of the common law. The law of England was and is a complex *corpus juris* and embodies much that has come from other systems, particularly the civil law. Laws of great antiquity and involving most important human rights were founded entirely on the civil law, and the procedures and remedies incident to them

were administered by courts whose structure and machinery were utterly foreign to common law concepts. Ecclesiastical rights, maritime rights, and the vital rights pertaining to crown revenues were largely administered in courts whose procedure was essentially a civil law procedure, and which, incidentally, those administering the common law sometimes viewed with suspicion and abhorrence.

There were, of course, many Acts of Parliament which affected or dealt with matters exclusively of civil law cognizance, some exclusively of common law cognizance, and others of such general application that they affected all systems, courts and subjects to varying degrees. A statute in its substantive aspects might apply to the whole realm, but in its procedural and remedial aspect, if any, affect one or several systems and one or several jurisdictions.

The jurisdictions of America did not adopt, as their rule of decision, the laws and procedures of *England*, which would have included civil, maritime and ecclesiastical law and procedure. They adopted only the common law of England, and took unto themselves only those parts of the unwritten and statute law of the mother country which were essentially part and parcel of the common law system.

A system of forfeitures in favor of the sovereign authority and a procedure for their enforcement had long been a part of the English common law scheme, but in its essence and incidents they were entirely different from the statutory forfeitures which were considered in the state Supreme Court's last opinion, and which are the prototype of the California statute here under consideration. Those common law forfeitures followed conviction or attainder of a personal defendant, the forfeiture rested exclusively

upon the conviction and affected the property of the personal defendant alone or, in cases of attainder, those of his blood. These common law forfeitures were unenforceable by proceedings *in rem* in any court.

The statutory forfeiture did not regard the conviction of any personal defendant or even the guilt or innocence of the owner. It took place by operation of law upon bare use of the property in the interdicted act. The title of the owner became immediately divested and the rights of the crown, captors and informers came into being. These statutory forfeitures, we believe, go considerably back of the Navigation Act of 1660 (12 Car. II, Ch. 20; 7 Eng. Stat. at Large), to which the state court's opinion refers, but they had their roots in the civil law, and were entirely foreign to common law concepts. They were of continental origin, were brought to England by the Normans, and formed one of the subjects of jurisdiction of the Court of Exchequer, set up by the Conquerer. They were usually, but not exclusively, enforced by the peculiarly civil law remedy of condemnation and sale *in rem*, which the civil law Court of Exchequer and the courts of admiralty were able to accomplish by their peculiar civil law machinery.

In *The Palmyra*, 12 Wheat, 1, 7, Mr. Justice Story had before him an admiralty cause of statutory seizure and forfeiture of a vessel for piratical aggression. It was urged in opposition to the decree of forfeiture that there was no record of conviction *in personam* of a personal defendant for the offense charged in the libel. In disposing of this objection Justice Story took occasion to point out the distinction between the common law forfeiture where, in common law contemplation, title of the

offender was not divested until conviction, and "seizures and forfeitures created by statute, *in rem*, cognizable on the revenue side of the exchequer." (p. 7.)

It is apparent, therefore, that the forfeitures contemplated in the statutes, of which 12 *Car. II*, Ch. 20, is an example, were not of common law origin or cognizance, even in their substance, and it is, to say the least, doubtful if in any aspect they ever became a part of the "common law of England", as that term is used in the enactments and cases relating to the rule of decisions in American courts. Essentially these statutes deal with civil law.

In its substantive aspect, any act of Parliament became a part of the supreme law of England, and, in so far as these statutes enacted that there was a change in title *ipso facto* on the commission of the offense, they provided a principle of *substantive law* which all courts were bound to accept and follow in any judicial determination. Obviously no court, whether it was proceeding in a common law cause or in a cause of civil law cognizance, could refuse to apply the general substantive law. So, to that extent, it must necessarily be said that the substantive *rights and burdens* which the statutes created were within the cognizance of *all* courts and systems.

But, assuming that the principle of forfeiture by operation of law became a substantive rule of common law cognizance, it is certainly not true that each and every *remedy* by which that principle might be given effect became a common law remedy.

The author of the first opinion in the California Supreme Court distinctly pointed out that in questions of conflict between state and federal law, there was an es-

sential distinction between matters of substantive law and matters relating to the jurisdiction of courts in the administration of remedies. [R. 37.] In the last opinion, that essential distinction was entirely ignored.

In any cause, the substantive *rights and duties* of the parties to the transaction are of universal judicial cognizance, and must be regarded by courts of law, as well as courts of admiralty. But when we come to the consideration of *remedies*,—the means by which those rights are to be enforced or the wrongs redressed,—we have an entirely different situation. A remedy available under one system of procedure may be impossible under another, because the courts of the latter system are without the process and machinery to give it effect.

So, while it might fairly be said that the substantive rights of the crown, captors and informers, and the loss of right by the owner of the forfeited property, became matters of common law cognizance, the same is not true of all the remedies available under the various judicial systems by which the rights might be asserted.

These statutory forfeitures are almost invariably in this country, and usually in England, enforced by the civil proceeding *in rem* for direct condemnation and forfeiture. This is not a remedy which was cognizable at common law, and before the merger of the English courts under the Judicature Act, the common law courts,—King's Bench and Common Pleas, and the common law jurisdiction of the Court of Exchequer, had no machinery to afford such a remedy had their jurisdiction been invoked. There was such machinery only in the courts of civil jurisdiction,—the admiralty court and in the revenue side of the Court of Exchequer. After the merger of all these

courts, as the High Court of Justice, any remedy available under English law could be had in any division, but we understand that each division in practice adheres more or less to the subjects and practices of its predecessor court, and that forfeiture cases *in rem* still go to the Exchequer Division and to the Division of Divorce, Admiralty and Probate.

But, regardless of this recent merger of the courts of England into one great court of general jurisdiction, the essence of the remedy *in rem* in any cause remained and remains the same. A remedy *in rem* is and always was, not a common law remedy but a civil law remedy.

That proposition is in no way affected by the evident contemplation of the English forfeiture statutes that remedies thereunder might be under several systems, for, as we have heretofore pointed out, there may be several remedies, concurrent or mutually exclusive, to enforce a single right or redress a single wrong. Some remedies available under the forfeiture statutes were clearly cognizable at common law, and as we shall see, in proper cases the common law courts have enforced them by common law procedure.

The most modern English statute mentioned by the state Supreme Court is *The Customs Consolidated Act of 1876* (39 & 40 Vict. Ch. 36), wherein it is provided that all duties, penalties and forfeitures may be sued for, prosecuted, determined and recovered by action, information or other appropriate action in the High Court of Justice in England, in the Superior Courts of common law at Dublin and Edinborough, or by information before any justice. Under that authorization an action could be maintained for any penalty or for the recovery of any

forfeited property against any personal defendant by common law process, or by direct condemnation and sale by process and proceeding *in rem*, according to the practice of the old civil courts. The earliest statute mentioned (12 *Car. II*, Ch. 20) indicates the same broad scope of remedy, although couched in less modern phraseology:

> ". . . and one-third to him who shall seize, or sue for the same in any court of record, by bill, information, plaint or other action."

The word "information" appears in both statutes, and manifestly refers to the complaint or libel by which the jurisdiction of the civil law courts, admiralty or exchequer, was and still is invoked.

It is unmistakable, therefore, that even the seventeenth century statutes, upon which the author of the opinion relies, did nothing more than to create a new sort of forfeiture, different from the old common law forfeitures, and indicate that it might be given effect by any court within the limitations of its own peculiar procedure and process. They did not transmute or purport to transmute a civil law remedy into one at common law, or *vice versa*.

If, as the California court seems to believe, the effect of the forfeiture statutes, particularly 12 *Car. II*, Ch. 20, was to make a proceeding *in rem* into a common law remedy, it is to be expected that in the 200 years which elapsed between the enactment of the statute and the Judicature Act of 1873 there would have been some evidence of its utilization in a common law proceeding, or some assertion of jurisdiction *in rem* by courts administering the common law. The sixteenth and seventeenth century judges of the common law were notoriously jeal-

ous of their jurisdiction, and over the admiralty courts they claimed the power of prohibiton. Yet we have found no case where any court of common law ever attempted to proceed *in rem* in a forfeiture or other cause, or claimed the power to do so. We are satisfied that none can be found.

The state Supreme Court has referred to two common law cases wherein, it is inferred, the court gave effect to the forfeiture statutes *by a proceeding in rem*. Examination of the cases discloses that the proceedings were not remotely in the nature of proceedings *in rem*, but, on the contrary, were conventional actions *in personam*, wherein the court gave effect to the forfeitures strictly within the limitations of common law process and by a common law judgment.

In *Roberts v. Withered* (1696), 5 Mod. 193, 12 Mod. 92, an informer, on behalf of himself and the crown, filed *an action in detinue* against personal defendants in possession of property alleged to be forfeited under the Statute 12 *Car. II*, alleging that title was vested in the crown and the plaintiff, that the property was in the possession of the defendants, and a demand therefor and refusal. Judgment was prayed against the defendants for the possession of the property or its value. The court held (presumably on proof of the facts justifying a forfeiture) that title had passed from its former owners, that by bringing the suit the plaintiff became vested with title (one-third to him who shall seize, inform or sue for the same, etc.), and was entitled to judgment against the defendant as prayed. The action was the conventional action of detinue, the judgment operated only against the named personal defendants, and the court did not purport

to proceed against the property in any manner whatsoever. Exactly the same sort of action might be authorized by any state in its own courts today. It has no more the aspect of a proceeding *in rem* than an action on a promissory note.

Wilkins v. Despard, 5 Durnf. & East. 112, is even less in point. It was an action in trespass by the owner of forfeited property which had been seized by a Provincial Governor. The governor defended by justification, alleging the facts on which the forfeiture was based. It was held on the authority of *Roberts v. Withered* (*supra*), that title of the owner was divested by the offense and that the governor's seizure and possession were thereby justified. Here again is a conventional common law process and judgment with no element of a proceeding *in rem*.

The courts of common law in England undoubtedly had jurisdiction to hear and determine questions of substantive right, under the forfeiture statutes, and to determine, *when a common law remedy was sought*, whether a forfeiture had *occurred*. That naturally might be the basis of the right asserted or the defense interposed. To the extent, then, of determining that a forfeiture had or had not taken place, the common law, as well as all other systems, had cognizance, and this court has so held in the case of *Gelston v. Hoyt*, 3 Wheat. 246.

Therein an action in trespass against federal officers had been commenced in a state court. The charge was that they had converted to their own use a certain privateer owned by the plaintiff. The defense was that the vessel had been seized for forfeiture under the laws of the United States. Interposed was a general and several special pleas, the latter raising issues as to the propriety of

the seizure and the question of probable cause. At the trial it was shown that in the federal admiralty cause *in rem*, which followed the seizure, the vessel had been exonerated and a certificate of probable cause had been denied. The state courts gave and affirmed a judgment for the plaintiff. On writ of error to this court the propriety of the special pleas was considered, and it was held that the propriety of the seizure and the question of probable cause had been concluded by the decree in the admiralty cause. The decision was based on two grounds: (1) because the decree in the admiralty suit was *res adjudicata* against all the world, and (2) because, by the Judiciary Act, jurisdiction of *all* causes of admiralty cognizance *and* cognizance of all seizures and forfeitures under the laws of the United States were *exclusively* in the United States district courts.

It was urged that in England, jurisdiction *in rem* in forfeitures was exclusive in the Court of Exchequer, yet, notwithstanding, the cases of *Wilkins v. Despard* and *Roberts v. Withered* showed that the common law had at least a concurrent jurisdiction over causes involving forfeitures. Justice Story pointed out that the forfeitures involved in these cases were under the Act 12 *Car. II*, wherein it was enacted that one-third of the forfeitures shall go to him who shall "seize, inform or sue for the same in any court of record", which showed that cognizance of forfeitures under that statute was not exclusive in the exchequer court, and was at least concurrent in the courts of common law.

The conclusion is, of course, correct, but Justice Storey was talking about essential jurisdiction to hear and determine substantive rights and titles under the statute.

Common law undoubtedly had concurrent jurisdiction with the exchequer and the admiralty for that purpose, but it does not and cannot follow that it could exercise that jurisdiction by administering civil law remedies such as the proceeding *in rem*.

The common law had and no doubt still has power to administer these forfeiture statutes to the extent that the law permits them to be administered *in personam*, by process by which a personal defendant is brought before the court and affected, favorably or unfavorably, by a personal judgment. But it did not and cannot proceed *in rem*.

We must ever remember in cases of this kind that the conflict between federal and state jurisdiction with which we are concerned is not over the power to determine substantive rights, but the power to administer remedies, and the distinction between right and remedy must always be regarded. That which is saved to suitors in maritime causes by the saving clauses is not substantive rights cognizable at common law, but common law remedies.

Neither do the saving clauses save remedies in courts which are of non-admiralty jurisdiction and are often called courts of common law. In the absence of constitutional or other paramount restriction, any legislature may confer on any court the power to administer new remedies strange to the common law system. Such powers have often been conferred on courts of general jurisdiction, or even upon courts of the English system whose background was primarily common law. The remedies and forms of admiralty and of other systems have often been so conferred, and this is particularly true of the proceeding *in rem*. The state legislatures and the federal

Congress have freely borrowed it for use by non-admiralty courts and, in so far as it is to be administered in causes not of admiralty cognizance, it is right and proper that they did so. The framers of our government were jealous of the jurisdiction of admiralty, but not of its forms and processes.

But as this court and other courts have repeatedly held, a remedy borrowed from the civil law does not become a common law remedy because it happens to be administered by a "common law" court.

That point has also been overlooked or ignored by the California Supreme Court, which says, in the last opinion, that it is "necessary to determine" if the proceeding *in rem* is a type of action which was cognizable *in a common law court* [R. 43].

It is entirely immaterial that jurisdiction *in rem* has been exercised by the federal courts on their law side, or by many state courts of general jurisdiction. Neither is it material that the Parliament of England has conferred power to proceed *in rem* on the present courts and divisions of the English system which may have historically exercised strictly common law powers. The essence of the remedy *as a civil law remedy* remains.

This court has said:

> "The case before us is not within the saving clause of the Ninth Section. That clause only saves to suitors 'the right of a common law remedy where the common law is competent to give it.' It is not a remedy in the *common law courts* which is saved, but a *common law* remedy. A proceeding *in rem* as used in the admiralty courts *is not* a remedy afforded by the common law; *it is a proceeding under the civil law.*

When used in the common law courts it is given by statute." (Italics supplied.)

Mr. Justice Field in *The Moses Taylor*, 4 Wall. 411-31.

That statement of the essential character of the proceeding *in rem* has been quoted, referred to and affirmed in case after case, and it has been followed consistently by the courts of all the states whenever and wherever it has been brought to their attention. It has stood as a bar for seventy-five years to the exercise of state court jurisdiction *in rem* in any cause of admiralty cognizance, and if the rule is to be changed, only this court can change it.

The state Supreme Court has said that *The Moses Taylor* and other cases announcing the rule of interdict against proceedings *in rem* in a state tribunal were concerned with types of *in rem* proceedings which were foreign to the common law, and where an action *in rem* against a vessel has no counterpart in a common law court, These cases are not controlling, says the court, in circumstances where the common law provides an analogous remedy [R. 45-6].

This statement bewilders us as much as any thought in the opinion, for where, in the entire history of common law actions and common law remedies, can any action or remedy be found which is remotely analogous to the civil proceeding *in rem* for forfeiture? We mean no disrespect to the learned author when we put the query as bluntly as did Judge Wells in *Ashbrook v. The Golden State*, Fed. Cas. No. 574, p. 13:

"What lawyer ever knew or heard of a proceeding *in rem* as a common law remedy?"

If the author meant that substantive *rights* under the forfeiture statutes were cognizable in common law actions, the attempt to distinguish the cases holding to *The Moses Taylor* rule is patently bad, for the common law had and has just as much and no more cognizance over the substance of rights arising from maritime contracts and maritime torts, such as were under consideration in the cases applying *The Moses Taylor* rule, as it has of the rights created by the forfeiture statutes. The suitors in those cases had a maritime right, created or recognized by a state statute, to have recovery of money for the breach of contract, or for their damages due to tort. Those rights were certainly within the cognizance of a common law court or any other court, and a common law court could have adjudged and enforced them by common law process, if the owners or contractors could be reached for service.

But if the suitors desired to enforce those rights by foreclosure of the maritime lien,—the *jus in re*, which the statutes created or recognized, they found the common law impotent to accomplish that result, for it did not possess the remedial machinery to act directly against the property.

Precisely the same thing would occur in a cause involving forfeiture. If the offended crown or a captor or informer could find and reach a personal defendant who had possession of the forfeited property or who had received its proceeds, an action at law or equity would recover for the suitor the property or its value. But if the suitor wished to enforce his title, his *jus in re*, by direct proceeding against the forfeited thing, civil law remedies alone would accomplish it.

If there is any valid distinction between the right to enforce *in rem any property right*, whether it be a right by way of lien or a right by way of title, we do not sense it, and cannot sense it unless more fully instructed.

Indications in the opinion suggest the thought on the state court's part that a proceeding *in rem* for forfeiture was a common law remedy in England, because the Court of Exchequer enforced statutory forfeitures. A state court case is cited (*Reynolds v. The Steamboat Favorite*, 10 Minn. 100), wherein the court referred to these as "forfeitures according to the course of the common law" [R. 46]. The exchequer forfeitures were not remedies by common law, but by civil law. Justice Story in *The Palmyra*, 12 Wheat. 1-14, made this clear when he pointed out the distinction between common law forfeitures and exchequer forfeitures, which we have already considered. Furthermore, in the exercise of its revenue jurisdiction, the Court of Exchequer did not purport to function as a court of common law. It did have (or at least it asserted and "got away with") jurisdiction over certain causes of common law cognizance, but its functions in the matters of crown revenues were so entirely divorced from its asserted common law jurisdiction that Blackstone excluded that aspect of exchequer jurisdiction from the Commentaries as being a matter with which the great treatise on the common law had no concern.

2 Jones' Blackstone, p. 1544.

In concluding this presentation it may be well to suggest the serious consequences of any qualification upon the rule of *The Moses Taylor* being allowed to stand unchallenged:

The exclusive character of the admiralty jurisdiction to proceed *in rem* has been settled, without qualification, for over seventy-five years. It is a jurisdiction upon which rests the security of maritime property and maritime commerce. Shipowners throughout the world have known that their vessels can be proceeded against only within the bounds of a uniform and long established procedure,—that of the United States courts, sitting in admiralty. If *The Moses Taylor* rule is relaxed, even to the extent of permitting state courts to proceed directly against maritime property, for forfeiture alone, it places every ship or maritime *res* which comes into any port of the United States at the mercy of all the varying views and foibles of legislators, judges and magistrates whose training and experience may give them little understanding of affairs maritime, and whose political philosophy may be entirely out of sympathy with the considerations of harmony and uniformity of decision which impelled the founders of our government to protect the integrity of the admiralty jurisdiction with these statutory safeguards. If the rule of *The Moses Taylor* be so qualified, any state legislature or port authority in the land may provide for penalties and forfeitures to be imposed directly upon vessels, domestic or foreign, for almost any conceivable offense or trans-

gression of local police laws or regulations, without even a personal notice to an innocent owner who may be half a world away; and without the safeguard of a uniform and time-tested procedure administered by trained jurists. A local authority may seize and a magistrate condemn a ship for alleged violation of fishing regulations, refusal to accept a local pilot, anchoring in a particular place, or even for sounding a whistle; and unless some federal court or higher state court could find some other ground for intervention, the jurisdiction and judgment of the local court or magistrate could not be drawn into question. Such a possibility, to say nothing of the actuality, is unthinkable.

And, we further submit, the qualification of *The Moses Taylor* rule could not stop by excluding forfeiture causes alone, for if any proceeding *in rem* is permitted to state courts, the reasons and principle which underlie the rule are discredited and weakened. If a local authority may proceed against a ship for a forfeiture, it may do so for the property rights and liens of its citizens which local authority has created, and which may be totally at variance with the principles of harmony and uniformity of the maritime law. *The Moses Taylor* rule, once qualified, will ultimately fall, and if it falls, with it will go the heart of the federal jurisdiction of admiralty in this country.

CONCLUSION.

In its first opinion the Supreme Court of California decided the cause soundly and rightly. That decision was in accord with the paramount federal law and should never have been disturbed. In the second judgment the court permitted itself to be led astray by unsubstantial reasoning, and has announced a rule of decision which is contrary to the Acts of Congress and the binding decisions of the highest federal authority.

It is confidently submitted that the judgment of the California Supreme Court should be reversed, with the instruction that this cause was not within the jurisdiction of the California Superior Court, and should be dismissed for lack of such jurisdiction.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 60.

C. J. HENDRY COMPANY and FRANK SEMATOVICH,

Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California,

Respondents.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

I.

The statutory proceeding taken herein is not a common law remedy.

Our researches, since the oral argument, have brought to light additional authorities in England and in the reports of this Court which fully confirm our position that the statutory forfeitures of the type of that provided in *12 Car II* did not bring the proceeding *in rem* into the common law remedial scheme, but did contemplate a remedy *in rem* in the then existing courts of civil law jurisdiction, and remedies *in personam* according to the course of common law.

This duality of remedy under the Statute 12 Car II had contemporary recognition in the common law courts as is demonstrated quite definitely in the very full discussion of the case of *Roberts* vs. *Withered* in the respondents' brief, pages 11-14.

The successful argument on the motion in arrest of judgment pointed out: "Now it is no argument to say that because some persons have chose to proceed by way of information upon forfeiture on penal statutes, therefore an action of detinue will not lie". The Court agreed, holding that insofar as the rights of an informer were concerned, the bringing of an action of detinue was the common law equivalent of the civil law seizure.

It will be recalled that the Statute 12 Car II provided for the enforcement of the forfeiture by seizure, or suit for the same in any court of record by bill, *information*, plaint or other action. In the case of *Roberts* vs. *Withered* the suitor had evidently elected to proceed by the common law action of detinue wherein, of course, the process and judgment was entirely *in personam:*

That the word "information" connotes permission to invoke the jurisdiction of the Courts administering civil law remedies is clearly recognized by this Court in *The Samuel*, 1 Wheat. 9, wherein a libel in admiralty for forfeiture had been filed by the United States under the Act of March 1, 1809. This statute prohibited the importation of produce of Great Britain; provided for penalties and forfeitures on account of such importations and provided that the penalties and forfeitures incurred under the Act "may be sued for, prosecuted and recovered * * * by action of debt in the name of the United States of America, or by indictment or *information* in any court having competent jurisdiction to try the same." It was claimed that the remedial provisions of this Act contemplated common law

remedies exclusively and that there was no jurisdiction in admiralty to proceed by libel *in rem*. In sustaining the admiralty jurisdiction, Chief Justice Marshall said, page 14:

> "In arguing the first point, the counsel for the claimants endeavored to take this case out of the principle laid down in *The Vengeance*, 3 D. 297, and in other cases resting on the authority of that decision, by urging a difference of phraseology in the acts of congress. * * * Debt, indictment, and information, are said to be technical terms, designating common law remedies, and consequently, marking out the courts of common law as the tribunals in which alone prosecutions under this act can be sustained. There would be much force in this argument, if the term 'information' were exclusively applicable to a proceeding at common law. But the court is of opinion that it has no such exclusive application. A libel on a seizure, in its terms and in its essence, is an information. Consequently, where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction to which it otherwise belongs."

Like duality of remedy was held to exist under another statute of the United States (1 Stats. at Large 289) in *United States* vs. *Grundy*, 3 Cranch 338. The statute provided for forfeiture of a vessel or its value where a false oath had been made to obtain its registration. No remedy was provided in the statute itself, but this court held the necessary inference to be that the government had, at its election, an admiralty remedy *in rem* for forfeiture of the vessel or a common law action against the perjured owner for its value.

Duality of remedy under the statute 12 Car II in the common law and in admiralty was not only permissible;

but the admiralty remedy *in rem* was expressly provided for. The statute contained a provision that all admirals and commanders at sea were authorized and required to seize and bring in as prize, forfeited vessels, and deliver them to the court of admiralty, there to be proceeded against. *The Annadale* (1877), 2 P. D. 218; 3 Asp. M. C. 489; 91.

Another forfeiture case decided by this court is the *United States* vs. *1,960 Bags of Coffee*, 8 Cranch 398, wherein it was held that the passage of title to forfeited property in cases of statutory forfeiture, depends essentially upon the language of the statute. If the vessel is declared to be forfeited upon the violation of the municipal law, title passes at once, and the ultimate decree of condemnation or judgment *in personam* relates back to the time of forfeiture. Under other statutes which provide, expressly or by implication, that title shall not vest in the sovereign until judgment or seizure, the title does not pass until the happening of that event, and prior to seizure there is nothing but an inchoate right. Justice Story filed a dissenting opinion on the question as to the time of vesting title under the statute involved and this opinion is a most exhaustive and interesting treatise on the general subject of common law and statutory forfeitures. Had the writer known of this opinion at the time of the oral argument, he would have been able to respond more competently to the invitation of the Chief Justice to compare the statutory forfeitures with the common law *deodand* (see pp. 410, *et seq.*).

It would seem to be clearly established by the foregoing cases: (1) that the statutory forfeitures are essentially different from the ancient common law forfeitures which arose upon the conviction or attainder of a personal

defendant, in that personal guilt of the owner is immaterial and the wrongful use of the thing is paramount; (2) that in their substantive aspects, the statutory forfeitures are of universal judicial cognizance; (3) that many of them provide for alternative remedies for enforcement; —*in personam* in the courts of common law jurisdiction and *in rem* in the courts of civil law jurisdiction; (4) that where the statutes are silent as to remedies and deal only with substantive rights, a suitor may select any appropriate remedy which the courts of any available jurisdiction are competent to give; (5) that the remedial jurisdiction of the common law was not enlarged by these statutes so as to include the power to administer remedies *in rem;* and that (6) where a remedy *in rem* is sought, and the property claimed to be forfeited was a thing maritime seized upon waters within the admiralty jurisdiction; that jurisdiction is exclusive.

It will also be apparent that, fundamentally, the jurisdiction as between admiralty and non-admiralty courts in England and in the United States in any proceeding under these forfeiture statutes is the same. The only difference is in the geographical concept of the admiralty. In England, jurisdiction of the admiralty did not extend within the borders of any county and was confined, by force of common law prohibitions rather than upon any sound principle, to the high seas and colonial possessions. (See *Waring* v. *Clarke*, 5 How. 441; 53) In the United States the limits of admiralty jurisdiction are the navigable waters, whether they be the high seas or territorial waters. But in both countries it is well established that jurisdiction *in rem*, based upon a seizure within the recognized geographical limits, is exclusive in the admiralty courts.

Let us pass now to the California statute here under consideration, and subject it to examination in the light

of these principles. It is clearly a statutory forfeiture of the general type of the Statute 12 Car. II and of the federal statutes above considered. Certainly it is not a common law forfeiture, for it in no way depends upon the conviction of a personal defendant. It differs from the Statute 12 Car. II only in the respect that the forfeiture does not become effective *eo instanto* upon the commission of the offense. By its express terms the court which determines the statutory proceeding must "order the same forfeited". We take it, therefore, that the title does not pass until an adjudication has been made and then presumably it relates back to the commission of the offense or at least to the date of seizure. The distinction is entirely unimportant.

Next we find that the remedial scheme of the California Statute is much more limited than the Statute 12 Car. II and most of the Federal Statutes. The remedy by seizure and petition and notice is exclusive and apparently mandatory. The commission "*must* commence proceedings in the Superior Court, etc." That seems to us definitely to exclude the idea that resort might be had, at the election of the state authorities, to any sort of common law remedy analogous to replevin, detinue or debt, or indeed any remedy whatsoever except the prescribed statutory proceeding in the Superior Court. We apprehend, however, that it would be entirely competent for the legislature of California to have provided a much more comprehensive remedial scheme, and to have empowered the commission to proceed at its election by seizure and proceeding *in rem* or by any remedy *in personam*. Indeed it would seem to follow that if the statute had merely declared that nets unlawfully used are forfeited to the state; and had remained silent as to remedial matters; jurisdiction would exist for the enforcement of the forfeiture by process *in rem* in an appropriate court or by process *in personam* in any court which could obtain juris-

diction of named defendants. However, we need not concern ourselves with a situation which might exist under another statute, or even with the question as to whether a common law remedy would be available under the statute as presently worded. No such remedy was sought in this cause, and no such remedy was afforded. The remedy sought herein and the judgment rendered were strictly *in rem* and were so regarded by the California courts throughout this litigation.

In this case we are not concerned at all with substantive rights under this statute but solely and entirely with remedies, and the jurisdiction of courts to afford them. The sections of the Judicial Code, here involved, do not deal with substantive rights. They deal only with the jurisdiction of courts. The saving clauses do not deal with substantive rights. They deal with remedies.

It is suggested in the respondents' reply that the proceedings and judgment here are not strictly *in rem* but are "in the nature of proceedings *in rem*". We cannot follow this distinction. Once it is postulated that the judgment herein does not purport to bind all the world, it necessarily follows that it does not bind anybody. A judgment may sound *in rem* or *in personam* or both, but we cannot imagine another alternative.

It was held by the Supreme Court of California that the cause of action here, although maritime, was not excluded by the *Moses Taylor* rule from the jurisdiction of state courts; that *The Moses Taylor* and cases following it were concerned with types of *in rem* proceedings that were foreign to the common law (R. 45). We take it, as do the respondents, that the court thereby meant that the cases where the *Moses Taylor* rule is adhered to were, for the most part, suits to foreclose maritime liens. Respondents' counsel claim that right of forfeiture is not a maritime lien,

and that the *Moses Taylor* rule must be confined to cases involving foreclosure of strict maritime liens for liquidated or liquidatable damages in causes of maritime contract and maritime tort. This distinction is entirely unsound.

The right of a municipal authority to seize and have forfeited a thing maritime for violations of municipal law rests upon precisely the same principles as the right of the holder of a maritime lien. It is a right in the thing, resting upon constructive hypothecation of the thing. In an ordinary case of civil tort, this constructive right arises because the vessel or thing by its wrongful act has caused injury. The injured party, therefore, has a right in the thing which the courts will adjudicate and enforce. Exactly the same situation exists when the thing is used in violation of a municipal regulation.

Prize causes and causes of seizure for municipal forfeitures fall within the admiralty jurisdiction over maritime torts.

The Belfast, 7 Wall 624; 37.

> "The right of the Crown to have a ship forfeited arises at the instant when the wrongful act is done, and, *like a maritime lien*, clings to the ship so that it overrides the right of a subsequent *bona fide* purchaser without notice of the fraud."

Roscoe's Admiralty Practice, 4th Ed. p. 261.

We submit, therefore, that if the right of forfeiture is not a maritime lien by very definition, it is so closely analogous to a maritime lien and rests so essentially upon the same legal principles, that no valid distinction can exist.

But, let us assume that there is a valid distinction between maritime liens and rights of forfeiture. The exclusive jurisdiction vested in the admiralty courts by the

Judicial Code is not limited to causes upon maritime liens, and the prohibition of the *Moses Taylor* rule is not limited to proceedings for the enforcement of liens. The Judicial Code says that the jurisdiction of the district courts of the United States in *all cases* of admiralty cognizance shall be exclusive of the courts of the several states. The cases announcing the *Moses Taylor* rule say that in *all* proceedings *in rem* the causes are excluded from state court jurisdiction. There is neither principle nor authority for limiting the rule to causes of strict maritime liens.

This court has frequently stated the nature of the admiralty proceeding *in rem*, and has not limited the definition to the enforcement of maritime liens.

> "Process *in rem* is founded on a right in a thing and the object of the process is to *obtain the thing itself*, or satisfaction out of it for some claim resting upon a real or quasi proprietary right in it."
>
> *The Maggie Hammond*, 9 Wall 435, 436.

> "Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime *privilege or a lien* attached to a vessel or cargo or both".
>
> *The Sabine*, 11 Otto 384; 388.

If the right to seizure for forfeiture is not strictly a maritime lien, it is most unmistakably a maritime right or privilege.

Jurisdiction *in rem* in the admiralty includes the enforcement of many rights which are not maritime liens within respondents' limited concept, and which involve relations to vessels and things maritime other than that of mere debtor and creditor. The rights of owners of things maritime are within admiralty jurisdiction *in rem*

and form the subject matter of petititory and possessory causes. The rights of part owners may be litigated *in rem* in causes of licitation and partition. Penalties and forfeitures for violation of municipal laws are litigated in proceedings *in rem* in causes of seizure. None of these are causes involving maritime liens under counsel's concept. Yet, the *in rem* jurisdiction of admiralty in those matters has been long established and universally accepted. Any limitation of the *Moses Taylor* rule, such as that advocated by the respondents, would withdraw from the exclusive jurisdiction of the admiralty, all these causes and we are sure that none of the Justices of this court who have joined in the decisions under the *Moses Taylor* rule had any such limitation in mind. In our opening brief, pages 17 to 25, we quoted the pronouncements of this court as to the extent of the prohibition against state court jurisdiction in admiralty causes, and it will be noted that on every occasion the opinion has said that *any* proceeding *in rem* is within the rule. We have failed to find any exception or qualification whatsoever.

II.

The cause of action herein is maritime and within admiralty jurisdiction.

Although the California Supreme Court sustained the jurisdiction herein by characterizing this statutory proceeding *in rem* as a "traditional common law remedy", the presentation for the respondents in this court suggests that counsel have little, if any, confidence in that holding. Evidently they place their main reliance for sustaining jurisdiction upon the claim that the cause of action herein was

non maritime, and no conflict with the admiralty jurisdiction is possible.

Counsel's basic authority, they say, is *Smith* vs. *Maryland*, 18 How 71, which was decided by this court twelve years before the first pronouncement of the *Moses Taylor* rule, and in which it is fully apparent that neither the court nor counsel were conscious of the problem presented in this case. We believe that almost enough has been said in the earlier briefs and at the argument to dispose of *Smith* vs. *Maryland* as an authority herein, but what little we have to add will be more forceful at the conclusion of this discussion, wherein we shall explore the essential character of the cause of action.

In the state courts we claimed that this is a cause of admiralty jurisdiction because it is a proceeding to vindicate a seizure of a thing maritime, made on the navigable waters. The Supreme Court of California sustained this claim in both of its opinions, and stated the basis and authority therefor (R. 37-8; 41-2). In this respect the state court was entirely sound.

Counsel insist that the character of the property and the situs of the seizure are not the true tests of admiralty jurisdiction, and that it depends upon whether the character of the substantive law in respect of which the forfeiture is claimed, is maritime or non maritime. They assert that the power to regulate fishing in territorial waters is exclusively with the states, and is non maritime; so jurisdiction of a cause of seizure for violation of such regulation must be non maritime.

The fallacy of these propositions may be demonstrated without the need to follow counsel in their examination into the basic concepts of the maritime law and the admiralty jurisdiction, or without pointing out how badly these quite

different concepts have been confounded. This court has been required to examine these matters many times and will not welcome the added labor of doing it in this cause.

Our very simple question here is: Have we a cause of action cognizable in admiralty? If so, it is a maritime cause of action, and it does not matter an iota whether the law upon which the state claims its substantive right is maritime or non maritime; state created or created by congress; statutory law or unwritten law. The validity of the authority for, and the rights and wrongs of the seizure, are for the determination of a court of competent jurisdiction, and our only problem is to determine where that jurisdiction lay.

The test of jurisdiction in causes of seizure for municipal forfeitures has been settled since the earliest days of this court. The test, as in any case which sounds essentially in tort, is the test of *situs*. It does not matter what was the character of the offense, or where it was committed. The place of seizure determines the jurisdiction. This was first held in *United States* v. *La Vengeance*, 3 Dall, 297, and was followed by many cases wherein the test was affirmed and re-affirmed. Many of the significant cases are cited in our first brief, pp. 14-16. We have never heard of any other test.

This jurisdiction was not created by the constitution or by any act of Congress. It was an historical admiralty subject matter from the earliest times in England, and Godolphin, Judge of the Admiralty under the Protectorate and Kings Advocate after the Restoration, included it as one of the "affairs" within the cognizance of the admiral.

"In like manner, all matters that concern owners and proprietors of ships as such;—also all causes of seizures and captures made at sea, whether *jure Belli Publici*, or

jure Belli Privati, by way of Reprisals, or *jure nullo* by way of Piracy;

> Godolphin, View of the Admiral Jurisdiction (1685) quoted in 4 Benedict, Admiralty, 6th Ed. pp. 392-3.

The Commissions of the Vice Admirals in the American colonies directed the governors as vice admirals to take cognizance of "* * * all manner of fines, mulcts, issues, forfeitures, amerciaments, ransoms and recognizances whatsoever, forfeited or to be forfeited, and pecuniary punish ments * * * in any court of our admiralty there held or to be held, presented or to be presented, assessed, brought, forfeited or adjudged;"

> Commission of Edward, Lord Cornbury as Vice Admiral, 4 Benedict, Admiralty, 6th Ed. pp. 409; 413.

During the pre-constitution period of the independence of the American states, the maritime states set up their own courts of admiralty, with some varying limitations on the wide jurisdiction of the colonial vice admirals, but we have not learned that any state ever excluded therefrom the ancient jurisdiction over seizures for forfeiture. Maryland, in 1776, set up a special court of admiralty to take cognizance of all libels on account of captures and seizures (4 *Benedict, Admiralty*, 6th Ed. p. 440).

When, by the constitutional grant, jurisdiction of all admiralty and maritime causes passed to the United States, it is obvious that jurisdiction of seizures at sea passed with it, and by the 9th section of the judiciary act of 1789, was vested exclusively in the district courts of the United States.

But, the respondents insist, this forfeiture arose under a *state law*, and the decisions of this court, dealing with

forfeitures under United States laws, are without bearing. Only seizures under *national* law, say counsel, come within the admiralty jurisdiction (Brief 51-4).

It obviously is not the character of the law, state or national, maritime or non-maritime, that makes a case of admiralty or non-admiralty cognizance, but the character of the *cause of action* which is to be asserted. Causes under the *United States laws* are not of admiralty cognizance *per se*, but only where they are civil causes of *admiralty and maritime jurisdiction*. Precisely the same test of admiralty jurisdiction must be made in cases arising under federal laws as must be made in cases arising under the laws of a state. What was the *situs* of the seizure? If it was on the navigable waters it is an admiralty cause. If on land, or non-navigable water, it is a non-admiralty cause.

It is true, of course, that in causes arising under the laws of the United States, original jurisdiction is exclusive in the *United States District Courts* in non-admiralty as well as in admiralty causes, but the former jurisdiction exists by virtue of other provisions of the Judicial Code than the grant of admiralty jurisdiction. *Sec. 24, subd. 3*, in addition to the admiralty grant, also confers jurisdiction "of all seizures on land or water *not* within the admiralty and maritime jurisdiction", and *subd. 9* confers jurisdiction "of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States". By *Sec. 256*, jurisdiction of admiralty causes *(subd. 3)*; and of causes of seizures under the laws of the United States on land or on water not within the admiralty jurisdiction *(subd. 4)* is *exclusive* of the courts of the several states.

It is significant to note that the jurisdiction of non-maritime seizures mentioned in Sec. 24, subd. 3, *are not exclusive*

in the district courts, unless they are made under the laws of the United States. This would seem clearly to leave open to state jurisdiction, non-maritime seizures under their own laws, by proceeding *in rem* or otherwise.

If, because of the grant of admiralty jurisdiction, the United States is compelled to litigate the validity of its seizures made upon navigable waters on the admiralty side of the district courts, it is hard to see upon what principle a state may escape it. It was settled in *The Glide*, 167 U. S. 606, that a state might validly create by law, a lien or right in a thing maritime, but the *enforcement* of anything in the nature of a maritime lien was a cause of admiralty cognizance, and if the preceeding was *in rem*, it was within the exclusive jurisdiction of admiralty. We cannot differentiate in any essential principle, the case of a state created right of seizure which is to be exercised on the navigable waters, and a state created maritime lien.

Any color of support which the respondents claim from the terms of the original *9th section* of the *Judiciary Act of 1789* (quoted in the footnote of Respondents' Brief, p. 52) will vanish upon a reading of the final paragraphs of the opinion in *The Eagle*, 8 Wall 15; 25-6.

Counsel insist that the regulation of fishing is a non-maritime matter, and is exclusive in the states. This seems heretical to us in the light of the historical jurisdiction of admiralty, but we must decline to enter into controversy over it. It doesn't matter in the least, for the states, at this time, *have* exclusive power to regulate fishing in their territorial waters. It may be because of retained police power, or it may be by grace of congressional inaction. It doesn't follow at all that because Congress has not assumed to regulate fishing, the subject is non-maritime. Granting that it is at present, a local matter; many maritime subjects

are local matters, and Congress has left many of them for state regulation. Pilotage, quarantine regulations, most harbor regulations, local maritime employment are, or until quite recently, were, left entirely to state regulation. The state laws on such matters are just as much a part of the maritime law as the acts of Congress. They are perfectly valid and enforceable in admiralty, unless they contravene a paramount act of Congress or work disharmony in the maritime law in its international or interstate relations.

Southern Pacific Co. v. Jensen, 244 U. S. 205;
1 Benedict, Admiralty, 6th Ed. secs. 34 and 35; pp. 75-83.

But, assuming for the sake of argument, that the regulation of fishing is a non maritime subject, it does not change a cause of maritime seizure into a non maritime cause. The subjects of municipal regulation under federal and state powers are manifold. Very few of them, however, can be said to deal exclusively with maritime subjects. We can say that the laws against piracy, and the laws covering the registration, use and operation of ships are strictly maritime, but that is about all.

On the other hand there are a vast number of subjects of municipal regulation which are strictly non maritime as to subject matter, although their violation may involve the use of ships and parts of ships. Here we can make an almost limitless enumeration, but to confine ourselves to a few obvious ones, let us take the laws against slaving, non intercourse laws, customs duties, protection of game and fish (the latter is non maritime say counsel), protection of public property on land, confiscation laws as to enemy or rebel property, and the ever interesting subject of national prohibition.

Seizures and forfeitures of property used in the violation of all these municipal laws have been provided for by statute, but we have never found a case where the jurisdiction was laid upon the character of the law said to be violated. Invariably it is laid according to the *situs* of the seizure. Here are a few of the cases.

United States v. *La Vengeance*, 3 Dall. 297. Exportation of arms contrary to 1 Stats. at Large 369. Seizure of a ship on the water. Held a civil cause *in rem* with jurisdiction in the admiralty.

The Sally, 2 Cranch 406. Slaving contrary to 1 Stats. at Large 347. Seizure of ship on the water. Jurisdiction in the admiralty affirmed.

The Betsy and Charlotte, 4 Cranch 443. Violation of Non-Intercourse Act, 2 Stats. at Large 351. Seizure on water. Jurisdiction in admiralty affirmed, the court saying: "It is the place of seizure, and not the place of committing the offense which decides the jurisdiction".

The Samuel, 1 Wheat 9 Statute (Act of Mar. 1, 1809) prohibited importation of goods from Great Britain. Admiralty jurisdiction sustained upon a water seizure.

The Sarah, 8 Wheat 391. Libel against a cargo of wine for false entry of importations. The libel was filed on the admiralty side of the court, alleging a seizure on the waters. On the trial it appeared that the seizure was made on land; whereupon the trial court directed a jury to be empanelled, and a judgment of condemnation was rendered on the verdict. On appeal to this court, the judgment was reversed and the cause remanded, the court saying that although the admiralty and non admiralty jurisdiction were vested in the same court, they were as distinct from each other as if vested in different tribunals.

"The court for the Louisiana district was acting as a court of admiralty; and when it was shown that the seizure was made on land, its jurisdiction ceased" (p. 394).

After the libel had been amended "so as to become technically an exchequer information for seizure", the case came up again on writ of error in *United States* v. *422 Casks of Wine*, 1 Pet. 547.

The last two cases involved the customs laws, which are not maritime in subject matter. Custom duties cannot be collected by a suit in admiralty, unless the statute gives a lien or provides for forfeiture, and a seizure is duly made on navigable waters. See *United States* v. *350 Chests of Tea*, 12 Wheat 486; 498, where the court said:

> "Now, it is not pretended that this is a civil cause of admiralty and maritime jurisdiction; and it has already been shown, that there is no law of the United States, of impost or otherwise, to warrant the seizure of the teas in question, or to subject them to forfeiture. But even if there were such a law, the only proceeding which could have been instituted under it, must have been to forfeit the articles seized, and not to subject them to the payment of duties. If the case be not one of forfeiture, we can perceive no ground upon which the District Court could entertain a suit, by way of libel, to enforce the payment of duties. No jurisdiction is conferred upon that court in such a case, either by the above section of the judiciary act, or by any other act of Congress. There is no doubt, but that a suit at common law might be instituted in that court, as well as in the Circuit Court, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or damages for the illegal taking or detaining of the same. But the remedy which has been selected, is not one which can obtain the sanction of this court."

Under the Civil War Confiscation Statute, (Act of Aug. 6, 1861) which was certainly not maritime in subject matter, the question of jurisdiction as between admiralty and non admiralty often rose. The general subject was considered by this court in *Union Insurance Co.* v. *United States,* 6 Wall 759; 764. In that case and in *Armstrongs Foundry* v. *United States,* 6 Wall 766, the seizures were of buildings on land, and it was held that the jurisdiction was not in admiralty, although the forms of admiralty might be followed. In *The Confiscation Cases* 7 Wall 454, vessels were seized on the water, and it was held that the jurisdiction was in admiralty.

These last mentioned cases arose under the same statute. The jurisdictional question in them, as well as in the earlier cases herein cited, was not technical or artistic; it involved vital rights, for if the causes were not in admiralty, the owners were entitled to trial by jury; whereas if they were admiralty causes, there was no such right.

By this line of the decisions of this court, (and we have not cited all of them), the principle that jurisdiction depended upon the *situs* of the seizure became so firmly fixed, that there is seldom any discussion of it. It is taken for granted in scores of cases involving all sorts of forfeitures and penalties. It will be interesting, however, to look at a few cases under the federal fish and game conservation laws in the territories wherein the federal government exercises the same sovereign functions as do the state governments in their territory.

In *The Tokai Maru,* C. C. A. 9, 190 Fed. 450, an alien vessel was seized for taking fish in Alaskan waters, other than by rod, etc., contrary to *34 Stats. 263;* almost an identical offense with that for which the net in this case was seized. The jurisdiction was in admiralty.

In *The Kodiak*, D. Alaska, 53 Fed. 126, a vessel was seized for alleged taking of sea otter in the territory of Alaska and in the waters thereof (R. S. 1956). Jurisdiction in admiralty was entertained and confirmed. The cause was heard on the merits and the libel dismissed for lack of proof. The case is particularly interesting in that it appears probable that the otter were actually taken on land. Jurisdiction in admiralty rested entirely upon the seizure on the sea.

In *La Ninfa*, C. C. A. 9, 75 Fed. 513, admiralty jurisdiction of a water seizure was accepted for alleged violation of the acts against sealing in Alaska and its territorial waters (R. S. 1956). The decree of forfeiture was reversed on the merits.

The following cases arose under the National Prohibition Act:

Kennedy v. *United States*, C. C. A. 9, 44 Fed. 2d 57, involved a seizure of alcohol imported from the Philippine Islands, made on land after arrival. It was held not to be of admiralty jurisdiction on account of the land seizure (42 Stats. 858, and 27 U. S. C. A. 40).

The Harber Trader, C. C. A. 2, 42 Fed. 859, was a seizure of a vessel and cargo of liquor under the National Prohibition Act (27 U. S. C. A. 40). It was held that the libel for forfeiture would lie, although it was held that there also existed, the right of summary sale of the property on conviction of the defendants. This case is interesting, as the forfeiture of property under the National Prohibition Act is essentially a common law forfeiture, depending upon conviction of a defendant. The remedy in admiralty by proceeding *in rem* is implied. It is another illustration of duality of remedy under a forfeiture statute, for, of course, a summary forfeiture in a criminal case is a conventional common law remedy.

A most interesting case is *The Barbara Cates*, E. D. Pa., 17 Fed. Supp. 241. This was a libel in admiralty to enforce damages as a penalty against a vessel for running into a government dike (33 U. S. C. A. 408-12). The *offense*—damaging the land structure, was non maritime tort. After careful reflection and study, the court held that the cause of action was not tort but *seizure to enforce a penalty*, and upheld the jurisdiction in admiralty because the seizure had been upon navigable waters.

From these cases it appears without doubt that the essential cause of action in these cases is not based on the nature, character or place of the alleged offense, but is based on the seizure. The logic of the situation is unescapable, for it is by the seizure that the government takes the first step in the assertion of its alleged right against the *res*. The seizure is rightful or wrongful as the event of the decree shall determine, and on the right or wrong of it, the ultimate property in the *res* will rest. It is therefore proper that the *situs* of that crucial act should determine the jurisdiction of the action.

We must not overlook the case of *The Bessie Mac*, W. D. Wash, 21 Fed. Supp. 220, which is square authority for the proposition that exclusive jurisdiction of seizures under state statutes for violation of state fishing laws is in the admiralty. This decision was published while the case at bar was in the appellate courts of California, and was cited with approval by the Supreme Court in its first opinion (R. 39). Counsel for respondents has vainly tried to distinguish it (Brief, 34-6).

During the argument, it was suggested that a jurisdictional distinction might exist between the case of a seizure for forfeiture of a vessel, and one for forfeiture of a net. We think not. There can be no doubt that a vessel is the essence of a thing maritime, and her essential equipment

is a part of her. The point might require consideration if the net had not belonged to a vessel, and was used as a beach net from the shore (see *Lawton* v. *Steele*, 152 U. S. 133). But this net was the *Reliance's* sole means of performing her function, and was as much part and parcel of her as her engine. This point was considered by the state court in both opinions (R. 37-8; 41-2), and correctly determined. The special equipment of a fishing boat,—her nets, lines, fishing stores and seime boat; the special machinery of a salvage ship, and the diving equipment of a pearler or sponger have ever been regarded as part of the vessel's "appurtenances" (see cases cited in our opening Brief, p. 14). They, as well as the vessel, are things maritime.

We return finally to *Smith* v. *Maryland*, 18 How 71. It must be plain from the report that the court did not realize that it had before it there a cause of seizure for maritime forfeiture, or had it been so, would it have departed from the long line of authority commencing with La Vengeance, with only the statement that the state law does not conflict "with the admiralty jurisdiction of any court of the United States"? It is clear from the case that the only points under consideration were whether the Maryland Oyster Law was a proper state regulation, and whether the power of regulation in territorial waters was or was not concurrent in the state and the United States. The case decided that the regulation of oyster taking was exclusively in the states, and that such regulation was not prohibited as an infringement of the commerce or admiralty grants. It still stands as authority on those points. But we submit the case is no authority on any point which was neither appreciated or decided.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~1083~~ 60

C. J. HENDRY COMPANY AND FRANK SEMATOVICH,
Appellants,

vs.

E. C. MOORE, I. ZELLERBACH, AND A. T. JERGENS,
AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OPPOSING JURISDICTION.

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Attorney General of California;
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Deputy Attorney General of California,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1083

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners and Appellees,

vs.

PURSE SEINE NET, APPROXIMATELY 325 FATHOMS LONG, 32 FATHOMS DEEP, APPROXIMATE SIZE OF MESH FIVE TO EIGHT INCHES,

Respondent,

C. J. HENDRY COMPANY, A CORPORATION, AND FRANK SEMATOVICH,

Claimants and Appellants.

APPELLEES' STATEMENT OPPOSING JURISDICTION.

Statement.

The appellees herein named, as members of the Fish and Game Commission of the State of California, respect-

fully present the following matters against the jurisdiction of this Honorable Court asserted by appellants.

We do not contest appellants' assertion that during the entire progress of this case in the State courts, there was "drawn into question the validity of" Section 845 of the Fish and Game Code of the State of California, "on the grounds of its being repugnant to the Constitution, . . . or laws of the United States." Nor do we contest the assertion that "the decision (herein appealed from) is in favor of its validity." However, we oppose the jurisdiction of this Court to review this case, upon the ground that the decisions of this Court, cited in the opinion of the Supreme Court of the State of California, sustain the decision of that court, to the effect, that the remedy prescribed by Section 845 of the Fish and Game Code of the State of California, is a remedy of a type recognized at common law, and therefore by virtue of the saving clause contained in Sections 24(2), 256 Judicial Code, (28 U. S. C. A. Sec. 41, subd. 3, Sec. 371) may properly be pursued in the State court.

Neither do we dispute the "Facts" of the case, nor the statement of the "Proceedings whereby the Federal question was raised and determined", stated by appellants under Point IV of their Statement of Basis of Appellate Jurisdiction in this Court.

Section 845 of the Fish and Game Code of the State of California reads as follows:

> "845. Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the Commission. The commission must commence proceedings in the superior court of the county or city and county in which the seizure is made by petitioning said court

for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for its hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the State treasury to the credit of the fish and game preservation fund."

Article III, Section 2, clause 1 of the Constitution of the United States, so far as material here, reads as follows:

"The judicial power shall extend • • • to all cases of admiralty and maritime jurisdiction • • •"

Pursuant to that constitutional grant, the Congress of the United States in the year 1789, adopted what has since been enacted into Section 256 of the Judicial Code (28 U. S. C. A. sec. 371), reading in part as follows:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

"• • •

"• • •

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. • • •"

By Section 24 of the Judicial Code as amended, (28 U. S. C. A. Sec. 41) original jurisdiction of such causes is given to the District Courts of the United States.

The Supreme Court of California held that the proceeding in question; an action to forfeit a net, used unlawfully to take fish in the territorial waters of the State of California, which action is provided for in Section 845 of the Fish and Game Code, supra, involved "a maritime cause of action"; but that the remedy for forfeiture provided for in that section, was "of a type recognized at common law", and that therefore concurrent jurisdiction between the State court and the admiralty court existed by virtue of the clause, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it • • •" No authorities are cited by appellants to dispute the proposition stated by the Supreme Court of California, and supported by numerous decisions of this court, that "If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the federal admiralty courts to entertain the action." Nor do appellants dispute the statement in the decision of the Supreme Court of California, that "The fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty • • • (citing cases) • • • does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy."

What appellants do dispute, as we understand it, is the next conclusion reached by the Supreme Court of California, that "the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts. • • •"

In reaching that conclusion the Supreme Court of California proceeded upon the following stated principles:

1. That when Section 9 of the Judiciary Act of 1789 was adopted, there had been little development of the common law in federal or state courts and that therefore it became necessary to examine the English common law as it existed before 1789.

2. In determining the jurisdiction of English common law courts, acts of Parliament defining that jurisdiction must be taken into account and that in California the common law of England includes not only the lex non scripta but also the written statutes enacted by Parliament.

Martin vs. *Superior Court*, 176 Cal. 289, (168 Pac. 135; L. R. A. 1918D, 313);

People vs. *Richardson*, 138 Cal. App. 404, (32 Pac. (2d) 433).

3. Though the present proceeding is in rem against the thing itself, that fact does not of itself, constitute the action one of a type unknown to the common law, in that actions in rem have long been permitted in common law courts for the forfeiture of goods used in violation of laws imposing such a penalty, even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes, citing English statutes and cases.

4. That the Federal cases recognize such forfeiture proceeding a valid remedy at common law, citing the following cases:

The Palmyra, 12 Wheat. 1;

United States vs. *Five Boxes of Asafoetida*, 181 Fed. 561;

The Sarah, 8 Wheat. 391.

5. That certain cases stating that an in rem action against a vessel is not a common law remedy, and therefore within the exclusive admiralty jurisdiction of the Federal

Courts are concerned with types of in rem proceedings that were foreign to the common law, citing the following cases:

The Moses Taylor, 4 Wall. 411;
The Hine vs. *Trevor*, 4 Wall. 555;
The Glide, 167 U. S. 606;
The Belfast, 7 Wall. 624.

6. That therefore the present action is of a type cognizable in the common law courts; is a common law remedy which the common law is competent to give and therefore within the saving clause of Section 256, Judicial Code, supra.

The authorities contained in appellants' statement do not conflict with the conclusions reached by the Supreme Court of California. The argument of appellants is simply this: that because this proceeding is in rem against a part of a vessel on navigable waters it is "according to the course of admiralty" and may therefore be instituted only in a federal court of admiralty, and that upon the authority of *The Moses Taylor*, supra, *The Hine* vs. *Trevor*, supra, and *The Glide*, supra, the proceeding is not one known to the common law and therefore not within the saving clause of Section 256, Judicial Code, permitting it to be brought in the state court. We submit that those cases speak for themselves and are, as stated by the Supreme Court of California, concerned, not with an in rem proceeding such as this —known to the common law—but on the contrary are concerned with an in rem proceeding unknown to the common law. They settle the question therefore that there is not drawn into question here anything not already decided by this court; hence the absence of a substantial federal question.

Directly in point on the question of jurisdiction; that the proceeding here involved is not of a type of in rem proceeding that must be prosecuted in a court of admiralty, is

Smith v. *Maryland*, 59 U. S. 71 (1855). In that case it appeared that the plaintiff in error, a citizen of the State of Pennsylvania, was the owner of a sloop licensed to be employed in the coasting trade and fisheries, and that said vessel was seized by the sheriff of a county in Maryland, while engaged in dredging for oysters in Chesapeake Bay, and that the vessel was condemned to be forfeited to the State, by a Justice of the Peace of that State before whom the proceeding was had. The Maryland statute in question, as quoted in the opinion on page 73, provided as follows:

> "* * * That it shall be unlawful to take or catch oysters in any of the waters in this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same.'"

Speaking with reference to State waters, and the control by the State thereof, the court said on page 75:

> "The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. Vattel, b. 1, c. 20, s. 246; Corfield v. Coryell, 4 Wash. R. 376. It has been exercised by many of the States. See Angell on Tide Waters, 145, 156, 170, 192-3."

On page 75 the court continued:

> "So much of this law as is above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters, whatever they may be; and it is the judgment of the court, that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board,—treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments. The Malek Adhel, 2 How. 233-4, and cases there cited. Our opinion is, that so much of this law as appears by the record to have been applied to this case by the court below, is not repugnant to the clause in the constitution of the United States which confers on congress power to regulate commerce."

And specifically with reference to the constitutional grant of admiralty and maritime jurisdiction, the court said on page 76:

> "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court in United States v. Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution."

The Maryland statute involved in *Smith* v. *Maryland*, was in practical effect, identical with Section 845 of the Fish and Game Code of the State of California under consideration in this case, and it is therefore respectfully submitted that the decision in that case, is in the final analysis determinative, that no Federal question is presented in this appeal.

Smith v. *Maryland*, supra, has never been overruled but on the contrary, and with regard to the validity of state statutes similar to Section 845 of the Fish and Game Code of California, has been approved in the following decisions of this court:

McCready v. *Virginia*, (1876) 94 U. S. 391, 394;
Manchester v. *Massachusetts*, (1891) 139 U. S. 240, 260, 261, 263;
Lawton v. *Steele*, (1894) 152 U. S. 133, 138;
Lee v. *New Jersey*, (1907) 207 U. S. 67, 70.

See:
The Abby Dodge, (1911) 223 U. S. 166, 174.

Conclusion.

Appellees believe that the decision of the Supreme Court of California is supported by decisions of this Court cited therein and in particular by the decision of this Court in *Smith* v. *Maryland*, supra.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 60.

C. J. HENDRY COMPANY and FRANK SEMATOVICH,
Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California,
Respondents.

BRIEF OF RESPONDENTS.

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IN THE

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vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California,
Respondents.

BRIEF OF RESPONDENTS.

Statement.

The opinion of the Supreme Court of California is reported in 18 California Reports, Second Series (Cal. (2d)), page 835 (118 Pac. (2d), page 1), October 20, 1941. That court held the remedy of forfeiture of a purse seine net, provided for in Section 845 of the Fish and Game Code of California, to be a common law remedy which the common law is competent to give and therefore not an invasion of the exclusive jurisdiction over admiralty and maritime causes granted to the United States by the Federal Constitution. Certiorari was thereafter granted by this court (62 S. Ct. 1036) following a petition filed therefor.

The Question Involved.

The broad question involved in this case may be stated as follows:

Is the jurisdiction of admiralty invaded by the enforcement of a state law, enacted for the purpose of preserving fish within the territorial waters of the state, which (1) prohibits fishing by means of a net in certain areas of said waters: (2) declares a net so used a public nuisance; (3) provides that such net shall be seized, which seizure takes place on navigable waters of the state in the prohibited area; and (4) provides that a proceeding for the forfeiture of a net so used be instituted in a state court, which proceeding is, in actual practice, in the nature of an action *in rem?*

Counsel for petitioners have consistently conceded the right of the state to enact substantive legislation prohibiting the use of nets, etc., in state waters; have conceded this to be within the police power of the state and not an encroachment upon the admiralty and maritime jurisdiction of the United States, and at the same time they have consistently maintained that, regardless of the validity of its substantive features, if the proceeding to enforce it —the remedy—is "traditionally according to the course of admiralty" exclusive jurisdiction lies in admiralty; (that the seizure pursuant to state law took place on navigable waters within the borders of the state.) that this proceeding *in rem* for the forfeiture of the net is a proceeding or

remedy "traditionally according to the course of admiralty" and enforceable only in admiralty.

Concededly, it was a violation of state law (Section 842, Fish and Game Code of California), to take fish by means of a purse seine net from the waters in question. The State law directly involved in this proceeding is Section 845, Fish and Game Code, which reads as follows:

> "Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the commission. The commission must commence proceedings in the superior court of the county or city and county in which the seizure is made by petitioning said court for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for its hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the state treasury to the credit of the fish and game preservation fund."

Summary of Argument.

At the outset, we feel that we should explain what might otherwise appear to be an assumption of inconsistent positions in our argument in this brief. Under Point I of our brief we argue in accord with and support of the conclusion reached by the Supreme Court of California—that the remedy involved in the state law here under review is a common law remedy which the common law is competent to give. In so doing, we accept and proceed from the premise of that court, which is that the cause of action involved is maritime. This premise is the opposite of the one upon which our argument under Point II is based, for there we contend that the state law involved invokes a non-maritime cause of action and provides a remedy beyond the jurisdiction of admiralty to enforce. Both positions are in opposition to the points argued by petitioners in their brief, and each, we believe, furnishes a complete answer to their contentions.

From the commencement of this litigation we have contended that the cause of action was non-maritime, relying basically upon the decision of this court in *Smith v. Maryland* (1855), 59 U. S. 71. The trial court [R. 7] and the District Court of Appeal [R. 32] were of the view that that case was controlling in favor of the state court's jurisdiction. Both opinions of the Supreme Court of California [R. 36, 41] are based upon the premise that the cause was maritime. In the first opinion it was held that *Smith v. Maryland* had been "overruled by the later

decisions which are directly to the contrary." [R. 39.] In the second, the one here under review, it was held that though the state law contemplated and gave rise to a maritime cause it nevertheless afforded a common law remedy which the common law is competent to give.

Throughout we relied principally on *Smith v. Maryland*. The pro or con of the conclusion reached in the second opinion was not urged by either counsel. In our Statement Opposing Jurisdiction we took the position that *Smith v. Maryland* may have been based upon the principle advanced by the California Supreme Court in its second opinion. After much research and study we are convinced that it was not, but, as we originally contended, was decided upon the principle that the state oyster law there involved gave rise to a non-maritime cause of action and that the remedy of forfeiture of the vessel as a penalty was not of admiralty cognizance. Our argument under Point II, *infra*, is made accordingly.

I.

The Remedy Contained in Section 845, California Fish and Game Code, Is a Common Law Remedy Which the Common Law Is Competent to Give.

A. The Opinion of the Supreme Court of California.

The opinion of the California Supreme Court proceeds from the premise that the cause of action here involved is maritime. Under our Point I we accept that premise, believing that it is clearly demonstrable that, even considered as a maritime cause of action, the remedy clearly lies within the saving clause of the Judicial Code. Such was the determination of the California Supreme Court in its decision here under review.

Proceeding upon the theory that the cause of action is maritime, we now consider the principles announced in the opinion and the authorities cited in support thereof.

A-1 Effect of the "Saving Clause".

Section 256, Judicial Code (28 U. S. C. A., Sec. 371) vests exclusive jurisdiction in the courts of the United States "Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it . . . ." The Supreme Court of Cali-

fornia construed the general effect of the saving clause in that section[1] and then stated that

> "the fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (see *The Sarah*, 8 Wheat. 391; *U. S. v. The Betsy and Charlotte*, 4 Cranch 433; *The Confiscation Cases*, 7 Wall. 454; *U. S. v. La Vengeance*, 3 Hall (Dall.), 297; *U. S. v. Grundy*, 3 Cranch 337; *The Palmyra*, 12 Wheat. 1), does not prevent California from conferring jurisdiction upon our courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy." [R. 42.]

We do not read those cases as involving Federal statutes requiring *by the provisions thereof* forfeiture proceedings against a vessel or its equipment for violation of such statutes to "be brought in a federal district court sitting as a court of admiralty." The statutes there in-

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[1] "The saving clause of the Judiciary Act makes it clear that a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued is traditionally within the jurisdiction of the common law courts. Even though the right to sue is created by a recently enacted state statute, it is within the saving clause so long as the remedy is of a type recognized at common law. (*Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109), including equity. (*Knapp-Stout & Co. v. McCaffrey*, 177 U. S. 638.)"

"* * * 'The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in the common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away.' (Benedict, Admiralty (5th Ed.) sec. 23. See *Knapp-Stout & Co. v. McCaffrey, supra; Red Cross Line v. Atlantic Fruit Co., supra.*)" [R. 42.]

volved were silent on the subject whether jurisdiction was in admiralty or elsewhere. Section 9 of the Judiciary Act of 1789 as it then existed *did* provide that the admiralty jurisdiction of the District Courts included "all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea" etc. The cases involved "laws of impost, navigation or trade of the United States", and under the terms of the Judiciary Act no court other than a court of admiralty had jurisdiction, but it was not because the particular statute involved in those cases *so provided*. It was because of an act of Congress conferring general jurisdiction in all such cases on the District Court. However, as stated in *The Eagle* (1868), 75 U. S. 15, 26, such a statute was "useless and of no effect", because forfeiture proceedings against a vessel and its equipment following seizure on navigable waters for violation of a *Federal* statute authorizing seizure and forfeiture were within the exclusive jurisdiction of admiralty by force of the general constitutional grant of admiralty jurisdiction alone. When the Revised Statutes were enacted in 1872 the portion of Section 9 of the Judiciary Act of 1789 above referred to was omitted. (Revised Statutes, Sec. 711.)[18] But admiralty has nevertheless continued to exercise jurisdiction of all forfeitures of vessels, etc., following seizure on navigable waters for violation of *Federal* law when the law in question permitted seizure and forfeiture as a penalty for violation.

Even so, it is true that the mere fact that admiralty has such jurisdiction, where a *Federal* law is involved,

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[18]See footnote (40), p. 52, *infra*, and see text, p. 52, *infra*.

does not prevent the State "from conferring jurisdiction upon her courts to proceed with" [R. 42] forfeitures of a vessel or its equipment following seizure for violation of State law. We so argue under Point II of this brief. The California Supreme Court, however, holds that a state is not prevented from conferring such jurisdiction "if the type of action is a traditional common law remedy." Without reference to the position taken under our Point II and proceeding upon the theory that the cause of action is maritime, we examine the remedy under the State law here to ascertain whether it "is a traditional common law remedy."

A-2 Forfeiture of a Vessel as a Penalty for Violation of a Statute Was a Remedy Known to the Common Law.

The Supreme Court of California then stated that the common law of California included not only the *lex non scripta* but as well the written statutes of Parliament enacted prior to the American Revolution.[2]

---

[2] "In 1789 when the Judiciary Act was enacted there had been little development of the common law in federal or state courts of the United States. An examination of the English common law as it existed before that time must therefore be made.

"In determining the jurisdiction of the English common law courts, acts of Parliament defining that jurisdiction must be taken into account. It is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament. (*Martin v. Superior Court*, 176 Cal. 289; *People v. Richardson*, 138 Cal. App. 404.). Other jurisdictions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies from the mother country in 1776 are included within the English common law. (See cases cited in 78 U. of Pa. L. Rev. 195; 11 Am. Jur. 166; 22 L. R. A. 508, *et seq.*)" [R. 43.]

We do not doubt that in the last analysis the question whether a remedy is a common law remedy, which the common law is competent to give and therefore within the purview of the saving clause, is to be determined by the Federal courts. Nor do we doubt that this Court will agree with the portion of the opinion of the California Supreme Court quoted in footnote (*2*), page 9, *supra*. The question, nevertheless, in any such case would seem to be whether, assuming the remedy to be a common law remedy, its enforcement would do violence to the uniformity and harmony of the maritime law which it was the purpose of the constitutional grant to preserve. (See Vol. 1, *Benedict on Admiralty*, (6th Ed.), p. 12, sec. 9, *et seq.*) For it is now settled that maritime rights are to be determined according to maritime law, not only when the parties seek a maritime remedy in a court of admiralty, but as well when they seek a common law remedy under the saving clause. (*Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 38 S. Ct. 501.) As we argue more fully later in this brief, the remedy here pertains to a local problem entirely, one local to each state, it does not interfere with the harmony and uniformity of the maritime law and it should be permitted to the states to enforce it in their own tribunals.

The Supreme Court of California then referred to an English statute of 1660 as conferring a remedy, such

as we are here concerned with, to the common law courts.[3]

Two cases are then cited by the California Supreme Court construing that statute. One is *Roberts v. Withered* (1696), 5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng Rep. 1186, and the other is *Wilkins v. Despard*, 5 Durnf. & East's Rep. 112, 5 Term Rep. 112, 101 Eng. Rep. 65.

In the first case, *Roberts v. Withered*, an action of detinue was brought "for goods forfeited by virtue of the statute" referred to in the opinion of the Supreme Court

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[3] "While it is true that actions in common law courts are usually in *personam* as contrasted to the *in rem* proceedings of the courts of the admiralty, it has long been established that an action *in rem* can be brought by the state in an ordinary common law court for the forfeiture of goods or articles used in violation of laws imposing such a penalty even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes. The statute of 12 Car. II, c. 18 (7 English Statutes at Large) enacted in 1660 provided that all imports to and exports from England and its possessions must be in English ships 'under the penalty of the *forfeiture and loss of all the goods and commodities* which shall be imported into or exported out of any the foresaid places in any other ship or vessel, *as also of the ship or vessel, with all its guns, furniture, tackle, ammunition and apparel*; one third part thereof to his Majesty, his heirs and successors; one third part to the governor of such land, plantation, island or territory where such default shall be committed, in case the said ship or goods be there seized, or otherwise that third part also to his Majesty, his heirs and successors; and the other third part to him or them who shall seize, inform or *sue for the same in any court of record*, by bill, information, plaint or other action, where no essoin, protection or wager of law shall be allowed; . . . (Italics added.) This statute, providing for the institution of forfeiture proceedings in any court of record against ships and cargoes used in violation of the act clearly authorized a remedy by forfeiture in the common law courts." [R. 43, 44.]

of California. *Non detinet* was pleaded. Motion in arrest of judgment was made upon the following grounds:

> "that an action of *detinue* will not lie except where the defendant comes by the goods either by *delivering* or by *finding*, and where the plaintiff has an *antecedent right*, neither of which is this case; and it is not enough to say, that the statute vests a property in him who first sues for the forfeiture, because, by the express words thereof, the right is not attached but by seizure or information. Most of the statutes which give penalties of forfeiture direct how they shall be recovered, *scilicet*, 'by action of *debt*, bill, plaint, &c.', but where a law gives a property 'by information or seizure' of the goods, an action of *detinue* will not lie till that be done, because it cannot be a wrongful detainer of that to which the party had no right."

Opposing the motion for arrest of judgment, plaintiff contended that an action of detinue would lie for the following reasons:

> ". . . for as the act had given only the penalty of one hundred pounds, one moiety to the King, the other to him who shall sue for the same, and had not said in what action, it will not be denied but that *debt* would have been the proper action in such case for the informer to recover his moiety. There was no difference between *debt* and *detinue* for such a forfeiture; for the informer had an antecedent property in neither. But in this case there is a forfeiture immediately vested in the King and party, and if

one may have an action, the other may also sue for his moiety. Now it is no argument to say, because some persons have chose to proceed by way of *information* upon forfeitures on penal statutes, therefore an action of *detinue* will not lie for such a forfeiture."

The holding of the court was as follows:

"To prove that a forfeiture was *vested*, this case was compared by the court to *a replevin*, which supposes an antecedent property, as much as an action of *detinue*; for it is a rule, that the plaintiff must have the property of the goods in him at the time when they were taken; but yet the lord shall have a *replevin* of the cattle of his *villein* being distrained, though he had no property in them at the time of the distress made: for my *Lord Coke* (b) was of opinion, that the bringing *a replevin* is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the Act, the property is divested out of the former owner; and by this action now brought, it is vested in the plaintiff, and therefore he may bring *detinue* for it."

The same case was later considered in *Robert qui tam Witherhead* (12 Mod. 92; 88 English Rep. 1186). The question again was whether detinue would lie under the statute in question. Judgment went for the plaintiff and the court expressed itself as follows:

"Holt, Chief Justice. The design of this Act was to make an immediate alteration of the property of the goods; the one moiety to the King, the other to him who would inform and sue for the same. If he

had seized the goods, or any part in the name of the whole, no one will doubt but *detinue* would have laid. At common law, a villein had absolute property, and the lord had it not till seizure made. If a villein before such seizure had aliened, the lord could not touch them; but if they were distrained before seizure, the lord could replevy them (a): and yet a replevin supposes an antecedent right as much as a detinue; and the reason is, because the bringing a replevin amounts to a claim and seizure, an *eo instante* vests the property in the lord. In debt upon a bond, where the contract is to pay the money on request, the party brings his action without any request, yet the bringing the action is one; so here, the bringing a detinue amounts to a seizure.

"Rokeby, Justice. The property is devested out of the owner by importation, but not vested in him that sues until bringing the action or seizure (b)."

Then in *Wilkins, et al. v. Despard,* 5 Term Rep. 112 (101 Eng. Rep. 65), it was held that under the same navigation act if a ship was seized and forfeited by a Governor in a foreign country belonging to Great Britain the owner could not maintain trespass against the party who seized the ship although he did not proceed to condemnation, for the property was divested out of the owner by the forfeiture.

Section 4468 of the Political Code of California, enacted in 1872, provides that:

"The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state."

In *Martin v. Superior Court* (1917), 176 Cal. 289, 168 Pac. 135, that section was construed to include the "whole body of that jurisprudence as it stood, influenced by statute, at the time when the code section was adopted." (p. 293.) That, then, is the common law of California. There is no national common law in the United States distinct from the common law which each state has adopted for itself. (*Kansas v. Colorado* (1906), 206 U. S. 46, 96, 27 S. Ct. 655; *Western Union Telegraph Co. v. Call Publishing Co.* (1900), 181 U. S. 92, 101, 102, 21 S. Ct. 561.) As to the Federal Constitution, many of its provisions are framed in the language of the common law, as it was brought to this country by the early settlers, and the Constitution must, therefore, be read and interpreted in the light of the common law principles of history familiarly known to its framers. (*Kansas v. Colorado, supra.*)

Petitioners say that (Br. p. 10):

> "The existence of a statutory remedy in the laws of England prior to the separation of the American colonies does not mean that the statute was exclusively, or at all, of common law cognizance."

And that (Br. p. 32):

> "The constitutions or the legislatures of many states have provided, and the courts have held that the rule of decision in matters not covered by local statute, shall be the common law of England, and that, it frequently has been held, includes certain Acts of Parliament which deal with subjects of the common law, substantive and remedial."

Then the argument continues that forfeitures *in rem* were cognizable only on the revenue side of the Exchequer.[4]

The judges of the Exchequer were "Barons."[5] If we are correct that *Roberts v Withered, Robert qui tam v. Witherhead* and *Wilkins v. Despard,*[6] recognized a pro-

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[4]On the revenue side of the Exchequer the "Crown sued subject in respect of royal revenue." "Memoranda Rolls" were the first legal entries recorded and had to do with revenue cases in which the King sued the subject. As early, however, as 1236, a separate series of records were kept known as "Exchequer of Pleas plea rolls." (Vol. 177, The Law Times (1937), article, "The Court of Exchequer in Legal History".) It is there further stated (pp. 405, 406): "Thus by the fourteenth century the line of demarcation between memoranda and plea roll cases seems to have been drawn so that on the memoranda roll were recorded cases of King v. Subject; while the plea roll entered cases of Subject v. Subject. This differentiation may have corresponded to the sessions at which the respective types of cases were heard. Probably the memoranda roll pleas were dealt with at the audit sessions, while the plea roll cases were heard at separate sessions for pleas. . . . The jurisdiction of the Exchequer extended, as we have seen, over revenue cases in which the Crown sued subject in respect of royal revenue; and over common pleas property cognizable in the Exchequer because they concerned either the King's revenue or Exchequer officials. . . . Of the revenue cases there is little to say; their nature and limits are sufficiently obvious, and they do not present many obscure features. The common law cases need more comment. A plaintiff was entitled to sue in a case as touching the King's revenue if he was being pressed by the Crown for payment of a sum, contribution towards which was due him from another person. . . . In addition there are a few exceptional cases, such as those dealing with the affairs of merchants, a case on treasure trove and another concerning the damages caused by infringement of liberty. . . . In the sixteenth century the common law jurisdiction of the Exchequer was extended almost indefinitely by the fictional use of the writ *quominus*. This writ embodies the principle of the defendant's being liable to the plaintiff in part payment of debts owned by the latter to the King." (Vol. 177, The Law Times (1937), "The Court of Exchequer in Legal History," pp. 405, 406.)

[5]Bouvier's Law Dictionary.

[6]5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng. Rep. 1186; 5 Term Rep. 112, 101 Eng. Rep. 65.

ceeding essentially *in rem* for forfeiture under Statute 12 Car. II, c. 18, certainly the remedy was not administered in those cases in the Exchequer. It was entirely in a common law court, presided over by judges of a common law court; nor were any of the characteristics of a proceeding on the revenue side of the Exchequer present.

It would appear then that our next question to be solved is whether the Statute 12 Car. II, c. 18 was enacted "in aid of the common law";[7] in amendment of it. If it was, then it became part of the common law of California.[8]

Forfeitures were long known to the common law. Some were extremely harsh in their application.[9] The Statute 12 Car. II, c. 18 simply added a ground of forfeiture and prescribed how it should be effected. Thus it was merely amendatory of that which in substance had long been known at common law.

Petitioners misconceive entirely the mechanics whereby the forfeiture under 12 Car. II, c. 18 was effected. They state that it took place "by operation of law upon bare use of the property in the interdicted act." (Br. p. 34.)

On the contrary the common law doctrine of "relation back" (*Willett v. Jordan* (1934), 1 Cal. (2d) 461, 35 Pac.

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[7]*Martin v. Superior Court* (1917), 176 Cal. 289, 168 Pac. 135.

[8]*Scott v. Lunt* (1833), 32 U. S. 594, 604.

[9]The ancient common law doctrine of deodand recognized a forfeiture of personalty which had caused the death of a human being without the prerequisite of a trial or conviction of any person as a guilty participant in the injury which caused death. (See, 23 Am. Jur. p. 601, sec. 4, "Forfeitures and Penalties".) Also, there was the doctrine of attainder.

(2d) 1025), vested title upon judgment of condemnation and not before.[10]

It is also said that though the proceedings in *Roberts v. Withered*, *Robert qui tam v. Witherhead*, and *Wilkins v. Despard*[11] involved a common law remedy yet they are no authority for the proposition that the remedy contained in the state law here is a common law remedy, because those cases involved actions *in personam* and not actions *in rem*; that the former have always been known at common law whereas the latter are unknown to it; that proceedings *in rem* for forfeiture were cognizable only on the revenue side of the Exchequer, citing *The Palmyra* (1827), 25 U. S. 1, 14, 12 Wheat., where Mr. Justice Story said that the common law doctrine of forfeiture upon conviction of crime was never "applied to seizures and forfeitures created by statute, *in rem*, cognizable on the revenue side of the exchequer."

From that it is argued that proceedings *in rem* for forfeiture were cognizable *only* in the Exchequer on the revenue side. That conclusion does not follow. The revenue side of the Exchequer concerned itself *only* with suits

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[10]In *United States v. Grundy* (1806), 7 U. S. 337, 350, 3 Cranch., *Roberts v. Withered* and *Wilkins v. Despard* are carefully considered. There it is recognized that three types of forfeiture existed: (1) upon conviction at common law; (2) upon judgment of condemnation, the forfeiture relating back to the time of commission of the act; and (3) forfeiture in the alternative—forfeiture of the thing or its value—in which case there was no forfeiture until election made to so proceed. The forfeiture under 12 Car. II. c. 18 was of the second class. See, also, *The Palmyra* (1827), 25 U. S. 1, 14; 12 Wheat.

[11]5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng. Rep. 1186; 5 Term Rep. 112, 101 Eng. Rep. 65.

by the King against a subject.[12] The Statute 12 Car. II, c. 18 conferred jurisdiction for forfeiture thereunder upon common law courts[13] and the proceedings for forfeiture were there conducted as in *Roberts v. Withered*, *Robert qui tam v. Witherhead*, and *Wilkins v. Despard*.[14]

That was a statute, as we have said, amendatory of the common law. As stated in *Robert qui tam v. Witherhead*, *supra*, "the bringing a detinue amounts to a seizure." In all essentials the proceeding, though in detinue, was one *in rem*. In order to sustain the right to forfeiture it was necessary that there be a seizure and the court so held, but construed the bringing of the action as a seizure. This certainly was unnecessary to the maintenance of the action of detinue, for in such action, as distinguished from replevin, the plaintiff was always compelled to wait until the action was determined before he could have possession. Furthermore, the action was a detinue in name only, for though in detinue the judgment was conditional for the goods or their value and damages for their detention, thus leaving the defendant his choice of delivering up the goods or their value (2 Pollock and Maitland History of English Law, pp. 173, 174), the Statute of 12 Car. II, c. 18 left the defendant no alternative.

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[12]Vol. 177, The Law Times (1937), "The Court of Exchequer in Legal History," pp. 405, 406.

[13]In *Gelston v. Hoyt* (1818), 16 U. S. 245, 312 (3 Wheat.) Mr. Justice Story said, construing *Roberts v. Witherhead* (12 Mod. 92) and *Wilkins v. Despard* (5 T. R. 112) with reference to the Statute 12 Car. II, c. 8: "So that it is apparent, that in respect to forfeitures under this statute, the exchequer had not an exclusive jurisdiction, but that the other courts of common law had at least a concurrent jurisdiction."

[14]5 Mod. 192, 87 Eng. Rep. 602; 12 Mod. 92, 88 Eng. Rep. 1186; 5 Term Rep. 112, 101 Eng. Rep. 65.

Petitioners continually urge also that forfeitures *in rem* were unknown to the common law and were derived from the civil law. Regardless of their origin it is clear that, at least so far as the Statute 12 Car. II, c. 18 was concerned, such forfeitures under certain circumstances were made cognizable in a common law court and enforceable by a common law remedy.[15]

It is argued that proceedings *in rem* could not be available in a common law court because a decree *in rem* binds all the world and such a proceeding was unknown to the common law—a decree running against those not before the court. A decree *in rem* in admiralty does bind all the world, but it by no means follows that every decree *in rem* in every other court must do likewise. For instance, a state lien law for non-maritime transactions[16] and a state fishing law,[17] both of which contemplate proceedings *in rem* against a vessel bind all *except* maritime lien holders. "A proceeding *in rem* as used in the admiralty courts is not a remedy afforded by the common law; it is a proceeding under the civil law."[18] And so it is, but, as we have said, such a proceeding binds all the world whereas a proceeding *in rem* for forfeiture under the state fishing law here involved does not and could not purport to do so,[19] and in fact is not a true proceeding *in rem*.

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[15]In 13 and 14 Car. II, c. 11 (8 Eng. Stats. at Large) the forfeiture in common law courts of vessels is provided for in case of certain violations of law.

[16]*The Winnebago* (1906), 205 U. S. 354, 27 S. Ct. 509.

[17]*The Elexena* (D. C. Va. 1892), 53 Fed. 359, 362.

[18]*The Moses Taylor* (1866), 71 U. S. 411.

[19]*The Elexena* (D. C. Va., 1892), 53 Fed. 359, 362; and *The Winnebago* (1906), 205 U. S. 354, 27 S. Ct. 509.

A true proceeding *in rem* whether in admiralty or otherwise is binding on everyone.[20]

In a proceeding *in rem* in admiralty the vessel is considered as a sentient being capable of contracting and capable of committing torts. The maritime lien which is the foundation of such a proceeding arises out of a fictional hypothecation of the vessel for its contracts, torts, etc. The characteristics of maritime commerce have necessitated such a practice. Not so, however, with the proceeding *in rem* under the state law here. That proceeding does not arise out of *any* lien, nor has it anything to do with any of the characteristics on which such a lien is founded. The net here is no more considered a sentient being within the contemplation of an *in rem* proceeding in admiralty than is anything else forfeited as a penalty consequent to the commission of an unlawful act. It is simply seized because its possessor has used it in violation of law, and forfeited as a penalty upon him who so used it. If others have superior rights or maritime liens they are in no wise affected by the decree of forfeiture.[21]

It cannot be said, as petitioners contend, that a decision by this Court that the state law here affords a common law remedy will permit any state to create a right *in rem* as a remedy for any cause of a maritime nature it may create. The only proceeding *in rem* denied the states to enforce is that which is founded on the maritime lien.[22]

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[20]*Crall v. Poso Irr. Dist.* (1890), 87 Cal. 140, 148, 26 Pac. 797; *Cunningham v. Shanklin* (1882), 60 Cal. 118, 124; *State v. McGlynn* (1862), 20 Cal. 233, 270.

[21]*The Winnebago* (1906), 205 U. S. 354, 27 S. Ct. 509.

[22]*The Rock Island Bridge* (1867), 73 U. S. 213, 215; *The Resolute* (1897), 168 U. S. 437, 440, 18 S. Ct. 112, holding that the foundation of the proceeding *in rem* in admiralty is the maritime lien.

It is only "proceedings *in rem* according to the course of admiralty" which are denied them,[23] and no such proceeding exists in the absence of a maritime lien. Of course, other subjects of admiralty jurisdiction, not based on a maritime lien but on Federal forfeiture statutes for violation of Federal law, are wholly beyond the scope of state jurisdiction.

Never has it been considered in this country that a proceeding to abate a net as a nuisance—forfeit a net—because of violation of a state fishing law, was a "proceeding *in rem* according to the course of admiralty." In this connection it is most significant that this Court when promulgating the Admiralty Rules did not so consider it. In Rule 21, the requisites of a libel of information upon seizures of vessels in navigable waters and on the high seas are stated.[24] The rule has to do entirely with violations of Federal law. A libel for the forfeiture of a vessel

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[23] *Southern Pacific Co. v. Jensen* (1916), 244 U. S. 205, 216, 37 S. Ct. 524.

[24] "All informations and libels of information upon seizures for any breach of the revenue, or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed."

or its equipment for violation of a state fishing law could not possibly be drafted if that rule were to be observed and complied with. We may then safely say that, given a subject matter over which the state has exclusive jurisdiction, at least in the absence of an act of Congress or treaty, such as state fisheries,[25] the state may, in the absence of other constitutional or legislative restrictions, provide a remedy of seizure and forfeiture by a proceeding in the nature of an action *in rem*, even though the seizure be made on navigable waters within the borders of the state. The various states have acted in this respect upon the assumption that they had the right so to do since the founding of this government, and no one has before suggested that by doing so the uniformity or harmony of the maritime law has in the leastwise been impaired, or that proceedings of the kind here involved were "proceedings *in rem* according to the course of admiralty." At this late date such a claim flies directly in the face of a national usage and practice, which for over a hundred years has disclosed no impairment to the uniformity of the maritime law.

What has been said should dispose of all adverse contentions. One further observation, however. The Supreme Court of California stated that the remedy denied the

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[25]See *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382, upholding Act of 1918 giving effect to Migratory Bird Treaty of 1916. See, also, *United States v. Shauver* (1916), 214 Fed. 154, and *United States v. McCullagh* (1915), 221 Fed. 288, both denying right of Congress, prior to adoption of treaty, to regulate killing of migratory birds within the borders of the states.

states by *The Moses Taylor*[26] was a type of *in rem* proceeding foreign to the common law.[27]

It is quite true that the cases cited in the last footnote "were concerned with types of *in rem* proceedings that were foreign to the common law." They were concerned with proceedings *in rem* arising out of the breach of a *maritime contract* or the commission of a *maritime tort*, and never did the common law courts assume jurisdiction of proceedings *in rem* based upon such transactions. As we have said, proceedings *in rem* based upon breach of maritime contract or commission of a maritime tort have always been considered proceedings "*in rem* according to the course of admiralty," for admiralty has always assumed jurisdiction thereover. On the other hand, a proceeding to forfeit a vessel or its equipment as provided for in the statute and as a penalty for the violation of such statute falls within an entirely different category than the *in rem* proceeding involved in *The Moses Taylor* and the other cases cited by the Supreme Court of California. One has its foundation in the maritime lien; the other has not.

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[26]71 U. S. 411 (1866).

[27]"There are cases which state that an *in rem* action against a vessel is not a common law remedy and is therefore within the exclusive admiralty jurisdiction of the federal courts. (*The Moses Taylor, supra; The Ad. Hine v. Trevor*, 4 Wall. 555; *The Glide*, 167 U. S. 606; *The Belfast*, 7 Wall. 624.) These cases, however, were concerned with types of *in rem* proceedings that were foreign to the common law. They are authority for the rule that a state court can have no jurisdiction over an action *in rem* against a vessel when such action has no counterpart in the common law courts." [R. 45.]

If admiralty were to attempt to exercise jurisdiction in all cases such as this one the result might very readily produce a highly confused and even chaotic situation. A large majority of our states either contain or border upon navigable waters. Each has its own local conditions and problems—peculiar to itself. This has heretofore been recognized, and no effort has been made by the Congress or through judicial construction to treat of or provide for such localized control. We submit that the reason for this is that our maritime law, which strives for uniformity and harmony in its application, has wisely forsworn any attempt to impose generalized rules upon local or provincial situations and needs.

Therefore, we say that the grounds upon which it has been held that proceedings *in rem* against vessels are of admiralty jurisdiction—such as those for breach of maritime contracts, the commission of maritime torts or for forfeiture upon a violation of Federal statutes prescribing forfeitures as a penalty—are entirely lacking in this case and, that, in accepting the theory adopted by the Supreme Court of the State of California, viz., that the cause involved here is a maritime cause of action, it must be concluded, upon both principle and authority, that the remedy afforded by the statute is a common law remedy which the common law is competent to give, and hence within the saving clause of the Judicial Code.

II.

Section 845, California Fish and Game Code, Invokes a Non-maritime Cause of Action and Provides a Remedy Not Cognizable in Admiralty.

As we have said, the basic authority for our position under this point is *Smith v. Maryland* (1855), 59 U. S. 71. Petitioners counter that this case has been overruled, commencing with the decision in *The Moses Taylor* (1866), 71 U. S. 411. We shall first refer to the *Smith* case and then, for the purpose of demonstrating the entire dissimilarity in the principles upon which it and the cases claimed to have overruled it in some respect were based, engage in the analysis indicated in the index of this brief, which, when carried to its logical conclusion, completely refutes petitioners' claim.

A. Smith v. Maryland Decided by This Court in 1855 is Controlling.

In *Smith v. Maryland, supra,* a statute of the State of Maryland, enacted to prevent the destruction of oysters in the waters of the State, provided in part (p. 73):

> " 'That it shall be unlawful to take or catch oysters in any of the waters of this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same.' "

The plaintiff in error in the case was a citizen of the State of Pennsylvania and the owner of a sloop called

"The Volant", regularly enrolled at the port of Philadelphia and licensed to be employed in the coast trade and fisheries. She was seized by the sheriff of a county of Maryland while engaged in dredging for oysters in Chesapeake Bay and was condemned to be forfeited to the state of Maryland. On appeal to the Circuit Court for the county, that being the highest court in which a decision could be had, the decree of forfeiture was affirmed. The plaintiff in error insisted that the seizure and condemnation were repugnant to the United States Constitution. The court held that the enrollment and license above referred to conferred no immunity from the operation of valid laws of a state, "But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws." (p. 74); that the soil below low-water mark was the subject of exclusive propriety and ownership in the State and held by the State "not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish." (p. 74.) The court further continued on page 75:

> "The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."

The court then held that the Maryland law was of that character; its purpose being to prevent the destruction of oysters within the waters of the State, by the use of particular instruments in taking them. Then, with reference to the portion of the Maryland law quoted *supra*, the court said on page 75:

> "So much of this law as is above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters, whatever they may be; and it is the judgment of the court, that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board,—treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments."

In the quotation last set forth the court was referring to the alleged conflict between the Maryland law and the commerce clause. With reference to the grant of admiralty and maritime jurisdiction the court said on page 76:

> "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark,

save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution."

Smith v. Maryland is direct authority for the correctness of our position under this point. The court there laid down the rule in effect that such regulation by the State as is attempted by Section 845 of the California Fish and Game Code is no part of the general maritime law accepted and received in this country as interpreted by judicial decision (*The Lottawanna, infra*); that it has never been included within it by act of Congress nor is the remedy of seizure and forfeiture for violation of such a law within the jurisdiction of admiralty. Other cases recognize the same rule and follow *Smith v. Maryland.*[28]

In the early case of *Corfield v. Coryell* (C. C. Pa. 1823), Federal Cases 3230, an action for trespass was brought for the seizing of a certain vessel named "The Hiram." The vessel while in possession of one who had rented it from the plaintiff was seen raking and collecting

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[28] *McCready v. Virginia* (Va. 1876), 94 U. S. 391, 395; *The Ann* (D. C. Md. 1881), 8 Fed. 923, 926, 928; *Dize v. Lloyd* (C. C. Md. 1888), 36 Fed. 651, 652; *Manchester v. Massachusetts* (1891), 139 U. S. 240, 254, 259, 260, 261, 262, 263, 264, 11 S. Ct. 559; *The Elexena* (D. C. Va. 1892), 53 Fed. 359, 366; *Shively v. Bowlby* (1893), 152 U. S. 1, 24, 49, 14 S. Ct. 548; *Lawton v. Steele* (1894), 152 U. S. 133, 138, 139, 14 S. Ct. 499; *The City of Norwalk* (D. C. N. Y. 1893), 55 Fed. 98, 106; *The Abby Dodge* (1911), 223 U. S. 166, 174, 32 S. Ct. 310; *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409.

oysters in New Jersey waters with a dredge. She was boarded by the defendant who acted as a prize master and took her into port and put her under guard. A hearing was thereafter had and the vessel, with her tackle, appurtenances and furniture, was condemned and ordered to be sold. The defendant justified under an act of New Jersey forbidding raking and collecting of oysters in New Jersey waters at that time of the year. The act provided that for collecting oysters during the prohibited period the vessel, tackle, appurtenances and furniture should be forfeited. The opinion was written by Mr. Justice Washington sitting in that case as a circuit justice, but who at the same time was actually a justice of this Honorable Court. On page 552, Mr. Justice Washington stated as follows:

> "It is lastly objected that this act violates that part of the Constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction . . . . , but it is by no means to be conceded that, because offenses of the nature we are now considering may rightfully belong to the jurisdiction of the English admiralty, the power of that government to regulate fisheries being unquestionable, Congress has a like power to declare similar acts or any act at all done by individuals in relation to the fisheries within the limits of the respective states, offenses against the United States. . . . But we hold that the power to regulate the fisheries belonging to the several states, and to punish those who would transgress those regulations, was exclusively vested in the states, respectively, at the time the present Constitution was adopted, and that it was not surrendered to the United States by the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government.
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> "* * * * * * * * *

". . . If then it could be admitted that Congress might legislate upon the subject of fisheries within the limits of the several states, upon the ground of the admiralty and maritime jurisdiction, it would seem to be a conclusive answer to the whole of the argument on this point, that no such legislation has taken place; and consequently the power of the state government to pass laws to regulate fisheries within their respective limits remains as it stood before the Constitution was adopted."

Petitioners say (Br. p. 15) that "if it were a material factor we could present a convincing argument to the effect that the entire subject of the regulation of fishing in navigable waters is inherently maritime in character, and causes involving fishing regulations are of admiralty cognizance, in principle and historically." Then it is said that such a discussion "has no place in this case," for the "gravamen of the cause of action is not the *offense* but the *seizure*." On the contrary, that which petitioners choose to ignore is the necessary starting point to determine the whole question of jurisdiction, viz.: 1. The control of State fisheries has never been accepted as part of our maritime law;[28a] 2. Violation of a state fishing law gives rise to a non-maritime cause of action;[28b] 3. Non-maritime causes of action are not enforceable in admiralty.[28c] Furthermore, the enforcement of state fishing laws has never been accepted as part of the jurisdiction of ad-

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[28a] See cases, footnote 28, page 29, *supra*, and footnote 39, page 49, *infra*.

[28b] See Cases, footnote 28, page 29, *supra*; *Corfield v. Coryell*, *supra*, page 29 *et seq.*, and cases, footnote 39, page 49, *infra*.

[28c] See cases, footnote 41, page 53, *infra*.

miralty. The principles that we have just stated are more fully developed further on in this brief.

Petitioners insist repeatedly that if this proceeding be held to be within the jurisdiction of the state court to enforce "it will destroy the uniformity and harmony of admiralty procedure and ultimately lead to the upsetting of the entire admiralty jurisdiction." (Br. p. 11.) All states bordering the ocean have similar laws which have been similarly enforced for years, and no one has yet suggested them to have been inimical to the uniformity and harmony of the maritime law or admiralty procedure. In fact, Rule 21 of Admiralty Rules[29] of this court prescribing the contents of libels does not remotely contemplate jurisdiction in admiralty of such a proceeding. State lien laws based on non-maritime transactions[30] have not injured the uniformity of the maritime law and have consistently been enforced in the state courts in proceedings directly against a vessel.

Petitioners will argue, as they have in the past, that the cases we have cited as recognizing the rule announced in *Smith v. Maryland, supra*, and following its authority (see Footnote 28, p. 29), are not in point; that each of those cases was concerned with either a suit *in personam* or a non-maritime transaction. In their brief they say that in so far as the *Smith* case gave sanction to a proceeding for the forfeiture of a boat *in rem* for violation of a state fishing law, it was overruled by *The Moses Taylor* (1866), 71 U. S. 411, and later cases.

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[29]See footnote 24, page 22, *supra*.

[30]*The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Belfast* (1868), 74 U. S. 624, 645; *The Bee* (D. C. Ore. 1914), 216 Fed. 709, 710, 711; *Martin v. West* (1911), 222 U. S. 191, 196, 32 S. Ct. 42; see, also, *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (C. C. A. 9th, 1934), 73 Fed. (2d) 200.

In none of the cases relied upon as overruling the Smith case is it so much as mentioned. Though not at all controlling, it would seem under ordinary circumstances that, if this Court intended to overrule as broad a principle as that announced in the *Smith* case, it would have at least mentioned it in subsequent decisions; also, that the editors of standard legal publications would have recognized the alleged conflict in principle. In no case decided by this Court is it so much as intimated that the holding in the *Smith* case has been altered or departed from. Instead, that case has been followed consistently on one point or another in thirty-one Federal cases, thirteen of which are decisions of this Court.[21] Neither Benedict in his Standard

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[21] *Twitchell v. The Commonwealth* (1868), 74 U. S. 321, 327; *Edwards v. Elliott* (1874), 88 U. S. 532, 557; *United States v. Cruikshank* (1875), 92 U. S. 542, 552; *McCready v. Virginia* (1876), 94 U. S. 391, 394; *The Ann* (D. C. Md. 1881), 8 Fed. 923, 926; *Spies v. Illinois* (1887), 123 U. S. 131, 166, 8 S. Ct. 22; *Kansas v. Bradley* (C. C. Kan. 1885), 26 Fed. 289, 290; *Dize v. Lloyd* (C. C. Md. 1888), 36 Fed. 651, 652; *Manchester v. Massachusetts* (1891), 139 U. S. 240, 260, 11 S. Ct. 559; *Hardin v. Jordan* (1891), 140 U. S. 371, 382, 11 S. Ct. 808; *In re Boggs* (C. C. Ky. 1891), 45 Fed. 475; *The Elexena* (D. C. Va. 1892), 53 Fed. 359, 366; *Shively v. Bowlby* (1893), 152 U. S. 1, 24, 14 S. Ct. 548; *Lawton v. Steele* (1894), 152 U. S. 133, 138, 14 S. Ct. 499; *The City of Norwalk* (D. C. N. Y. 1893), 55 Fed. 98, 106; *Pacific Gas Imp. Co. v. Ellert* (C. C. Cal. 1894), 64 Fed. 421, 436; *Leverich v. Mayor of Mobile* (C. C. Ala. 1867), 110 Fed. 170, 173; *Lee v. State of New Jersey* (1907), 207 U. S. 67, 70, 28 S. Ct. 22; *The Abby Dodge* (1911), 223 U. S. 166, 174, 32 S. Ct. 310; *Lee Master v. Spencer* (C. C. Colo. 1913), 203 Fed. 210, 217; *United States v. Mackey* (D. C. Okla. 1913), 214 Fed. 137, 145; *United States v. Shallver* (D. C. Ark. 1914), 214 Fed. 154, 157; *United States v. McCullagh* (D. C. Kan. 1915), 221 Fed. 288, 292; *United States v. Samples* (D. C. Mo. 1919), 258 Fed. 479, 481; *United States v. 8 Packages etc. of Drugs* (D. C. Ohio 1910), 5 Fed. (2d) 971, 976; *Stewart v. Rivera* (1927), 274 U. S. 614, 619; *Ocean Industries Inc. v. Greene* (D. C. Cal. 1926), 15 Fed. (2d) 862, 863; *Wampler v. Lecompte* (1930), 282 U. S. 172, 174, 51 S. Ct. 92; *Strechfus v. Mayor* (D. C. Miss. 1935), 10 Fed. Supp. 529, 531; *Cunningham v. Shiriotes* (C. C. Fla. 1939), 101 Fed. (2d) 635, 636; *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409, 413

Treatise on Admiralty nor the editors of American Jurisprudence, Corpus Juris, or L. R. A. have intimated that *The Moses Taylor* and cases following were decided in conflict with or on the same principle as that decided in the *Smith* case.[22]

The Bessie Mac (D. C. Wash. 1937), 21 Fed. Supp. 220, is cited as a recent case in point. If that case be considered as authority contrary to our position, then it is the only one in existence, and upon the principles announced in this brief and the authorities cited is not only unsound but erroneously decided. It does not mention *Smith v. Maryland*, but, be that as it may, we do not believe the case to be adverse to our position. In that case the owners

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[22]In Benedict on Admiralty, both 5th and 6th editions, the author does not intimate, among the many examples given of inoperative State legislation invading the admiralty jurisdiction, that *Smith v. Maryland* has been overruled. (Benedict on Admiralty, Vol. 1, 6th Ed., section 34.) In Volume 22, American Jurisprudence "Fish and Fisheries", section 55 on the subject of forfeitures and seizures, it is stated at page 708: "It is clear that the state has the power to punish a violation of its fishing laws by the forfeiture of the apparatus used in the illegal fishing. The controversial question is whether the state can summarily forfeit and take or destroy the fishing appliances without giving the owner an opportunity to be heard." In 26 Corpus Juris "Fish", section 64 on the subject of searches and seizures, it is stated (p. 639): "Under some statutes nets, seines, and other appliances used in violation of the laws regulating and protecting fish and fishing rights, and also the fish which are unlawfully taken or possessed, may by proper proceeding be searched for, seized and destroyed. . . . A vessel used or employed in violation of the fish or oyster laws may, under some statutes, be seized and searched, and after proper proceedings be declared forfeited and destroyed or sold, although the owner is not implicated in the offense, and the vessel is so employed without his knowledge or consent; . . ." In Volume 1916F L. R. A. under the annotation entitled "Property Used in Violation of Game Laws" at page 916 it is stated: "The validity of statutes providing for forfeiture of boats or vessels for violation of the fish or shell fish laws has been often sustained." (Citing many cases, including *Smith v. Maryland, supra.*)

of the vessel in question had used it in connection with illegal fishing within the state. They were arrested by state officers and the vessel was seized, not within the jurisdiction of the state but on the high seas. The vessel was held by the Director of Fisheries from date of seizure, August 31, 1937, to October 13, 1937, on which latter date a so-called "petition" *in rem* was filed in the Superior Court of Washington in and for Clallam County, against the boat, net, etc., praying for confiscation and forfeiture thereof under the local state fishing laws. In the meantime, however, a libel was filed in the United States District Court by the owners of the vessel, alleging that it was a Canadian vessel within the navigable waters of the United States, that the owners were unlawfully deprived of possession of the vessel, etc., and her seine net, that the Department of Fisheries of the state was holding the vessel and net without warrant or process and refused to deliver them over,—in other words, that a maritime tort had been committed. The "petition" *in rem* filed in the state court alleged that the state court had admiralty jurisdiction (p. 222). There could be, of course, no basis for such a contention, and the court therefore dismissed it with the following statement:

> "The lien, or right of forfeiture claimed, is not founded on any rule of maritime law, but is dependent upon a right, if any, granted by state or federal statute or United States Constitution."

From that statement it is clear that the court was aware that the right of forfeiture existing under the state law for violation of the state fishing law was not founded on any rule of maritime law, was not a maritime claim or cause, but was secured to the state under the United

States Constitution as part of its police power. Then the court stated, on page 222:

> "The state court is impotent in this case from any viewpoint; it clearly appearing that it proceeds in form and substance against a res, upon the high sea, and it also proceeds against a res, not within the jurisdiction of the state court of Clallam County, since the res, a watercraft, is upon navigable waters; and also within the jurisdiction of the superior court of King county in the state."

We believe that the foregoing statement of the court was predicated upon the fact that the state officers had no authority to seize the boat upon the high seas; that when they seized it the possession of the true owner did not change, and that such seizure constituted a maritime tort and that the title to the vessel might be vindicated in a court of admiralty. It also appeared in the case that the state officials had seized and were about to proceed against the boat and net simply upon the basis of the owner's conviction for violation of the state fishing law. The court held that due process of law required a proceeding against the net itself. In other words, a maritime tort had been committed by the state officials of Washington, and the court said on page 223:

> ". . . Where possession of movable property has been changed, against the right of the true owner, by a maritime tort, . . . the owner may vindicate his title in a court of admiralty by a proceeding in rem. This is given acquiescence by Benedict (5th Ed.), p. 102. The charges in the libel, which upon the motion must be taken as true, clearly show wrongful taking of the vessel."

Petitioners refer (Br. p. 28) to cases directly or indirectly involving forfeitures "wherein *The Moses Taylor*

rule has been overlooked." Cases upholding State fishing laws authorizing seizure and forfeiture of nets and vessels used in violation thereof are then referred to. To avoid the effect of decisions adverse to their principal contention, their argument is therefore; 1. That though *The Moses Taylor*, *The Hine v. Trevor*, and *The Glide, supra*, do not mention *Smith v. Maryland*, they impliedly overrule it; 2. That the editors of all the standard legal works have overlooked the fact that *Smith v. Maryland* was impliedly overruled; 3. That the authors of Benedict on Admiralty have overlooked that fact; and 4. That the various state courts and Federal courts upholding such legislation have overlooked that fact down to and including the decision of *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409.

Such an argument casts doubt upon the entire position assumed by petitioners. One is naturally lead to inquire whether it might not be that *Smith v. Maryland* and *The Moses Taylor* were decided on principles entirely foreign to one another. We believe that an analysis of the principles involved in those two cases leads to the plain conclusion that they rest upon wholly different bases.

B. The Principles Announced in The Moses Taylor Etc. Are Not in Conflict With Smith vs. Maryland.

Petitioners contend that in addition to *The Moses Taylor*, the decisions in *The Hine v. Trevor* (1866), 71 U. S. 555; and *The Glide* (1896), 167 U. S. 606; 17 S. Ct. 930, impliedly overrule *Smith v. Maryland* insofar as the latter permits a state to proceed under a law of the state for the protection of its fisheries against a vessel or part thereof for forfeiture in a state court after seizure on

navigable waters of the state for violation of the state law.

Petitioners say that this court has observed (Br. p. 26) "that the exclusive character of the admiralty jurisdiction *in rem* was never brought to the attention of the court until the term of 1866, although prior to that time several of the states had, by statute, created various rights *in rem* in things maritime, and provided for their enforcement by suits *in rem* in state courts." *The Glide, supra,* and *Knapp, Stout & Co. v. McCaffrey* (1899), 177 U. S. 638, 20 S. Ct. 824, are then cited.

The Moses Taylor did decide for the first time that *maritime* rights could not be enforced by a proceeding *in rem* in the state courts, even though such rights existed only because conferred by local statute. As we shall presently show, the basis of the holding in the *Smith* case was and could not have been other than that the states control their own fisheries; that a cause of action arising upon violation of laws enacted thereunder give rise to a *non-maritime* cause of action which is not enforceable in admiralty.

Prior to the decision in *The Moses Taylor,* there had been an expanding state jurisprudence which asserted full admiralty jurisdiction.[33] In fact the early California cases had sustained the validity of state laws permitting suits *in rem* against the vessel for the enforcement of maritime liens.[34] Such an assumption of jurisdiction was definitely overthrown by *The Moses Taylor.*

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[33]See "Uniformity in the Maritime Law of the United States," University of Pennsylvania Law Review, 72 Am. Law. Reg. 231.

[34]*Averill v. The Hartford* (1852), 2 Cal. 308; *Meiggs v. Scannell* (1857), 7 Cal. 405; *Taylor v. The Columbia* (1855), 5 Cal. 268. See *Olsen v. Birch & Co.* (1901), 133 Cal. 479, 65 Pac. 1032.

The exclusive character of admiralty jurisdiction in the United States as applied to the enforcement of state laws permitting suits *in rem* in state courts *for the enforcement of maritime liens* was never called to the attention of this court until the year 1866.

Therein lies the point of difference in the cases. The cause of action, however, which arises upon violation of Section 845 of the California Fish and Game Code is *non-maritime* under the authority of *Smith v. Maryland*. The cause of action involved in *The Moses Taylor* was *maritime*. Admiralty has no jurisdiction to enforce non-maritime rights,[85] and the mere fact that the proceeding is for the forfeiture of the net as a penalty and in the nature of a proceeding *in rem* does not alone give jurisdiction to admiralty. State laws giving rise to non-maritime causes of action are enforceable *only in the state courts*.[86] In view of petitioners' claim, however, that the cause is maritime because the proceeding is *in rem*, we shall develop further our contention that the cause of action arising upon violation of the state law here is non-maritime, and so the remedy afforded is not of admiralty cognizance.

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[85] *Yone Suzuki v. Central Argentine Ry.* (C. C. A. N. Y. 1928), 27 Fed. (2d) 795, certiiorari denied 278 U. S. 652, 49 S. Ct. 178; *The Kearney* (C. C. A. N. J. 1926), 14 Fed. (2d) 949; *The St. David* (D. C. Wash. 1913), 209 Fed. 985.

[86] *Knapp, Stout & Co. v. McCaffrey* (1899), 177 U. S. 638, 642, 643, 647, 20 S. Ct. 824; *The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Belfast* (1868), 74 U. S. 624, 645; *The Bee* (D. C. Ore. 1914), 216 Fed. 709, 710, 711; *Martin v. West* (1911), 222 U. S. 191, 196, 32 S. Ct. 42. See, also, *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (C. C. A. 9th, 1934), 73 Fed. (2d) 200.

B-1. The Grant of Admiralty and Maritime Jurisdiction.

Article III, Section 2, Clause 1 of the Federal Constitution provides in part that:

> "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction. . . ."

Pursuant to that grant the Congress of the United States in 1789 adopted what has since been enacted into Section 256 of the Judicial Code (28 U. S. C. A., sec. 371), and which, so far as material here, provides that:

> "The jurisdiction vested in the courts of the United States in the cases and proceeding hereinafter mentioned, shall be exclusive of the courts of the several states:
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> ". . .
>
> ". . .
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> "Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. . . ."

It now becomes necessary to inquire as to the stuff of which admiralty jurisdiction and maritime law in this country consists in order to determine whether in its substantive and remedial aspects the state law here is a part of it.

B-2. THE ADMIRALTY. ITS JURISDICTION AND THE MARITIME LAW OF THE UNITED STATES IS ONLY THAT ACCEPTED AND RECEIVED IN THIS COUNTRY AS INTERPRETED BY JUDICIAL DECISION AND INCLUDED BY ACTS OF CONGRESS.

One of the most concise statements defining the terms "admiralty" and "maritime" which we have found is contained in an article entitled "Tradition and Common Sense in Admiralty" (1929), 14 Marquette Law Review 16, 19-20, where the author states as follows:

> "The true meaning of the constitutional grant of power may be approached conveniently by analyzing the two terms 'admiralty and maritime.' We cannot, of course, assume, as is apparently done quite frequently, that the two words are mere synonyms . . . 'Admiralty', if standing by itself, would indicate reasonably, that the draftsman intended that the United States courts should exercise such jurisdiction as the British Court of Admiralty possessed and none other. . . . If the makers of the constitution had meant to give only this sort of jurisdiction to the courts, they would presumably have stopped after this word; but they added the word 'maritime'. This is, obviously, a term of much wider significance. It denotes the international law of the sea. . . . This body of law deals with all things that pertain to the sea or the ships. It was, in principle, adopted at a very early day by every civilized seafaring nation in the world, with such modification as they might deem appropriate under their specific

conditions. The British Admiralty Law was such a local modification. Adding this broader term to the term 'admiralty' could have but one purpose, that of guarding against that narrow construction which has so often been attempted in this country. It might be asked, however, why if the Federal courts are to have jurisdiction of all cases arising under the international sea-law of the world, the Constitution adds the word 'admiralty'. The answer is obvious. The international maritime law lays down rules regarding rights and duties arising from the sea and navigation. It says nothing as to how these shall be adjudged. Admiralty laws means the way in which the English are in the habit of administering so much of the sea law as they administer in that particular court. To add it to the constitution is merely to say that our Federal courts will follow in their practice the rules of the English admiralty courts, as was done by the Vice Admirals exercising jurisdiction in the Colonies, subject to such change as Congress may from time to time enact. Admiralty law was the existing law of the Thirteen Colonies, and consequently of the new independent states, until it was changed by constitution or statute.

"This construction of the constitutional clause is substantially that for which Justice Story contended in his elaborate and learned treatise of the problem in DeLovio v. Boit, 2 Gall. 452, Federal Cases No. 3776.

"It is also implied in many of the leading cases of the Supreme Court of the United States.

"Waring v. Clarke, 5 How. 441; N. J. Steam Navigation Co. v. Bank, 6 How. 387; The Vengence, 3 Dall. 297; The Betsey, 4 Cranch 443; New Eng-

land Insurance Co. v. Dunham, 11 Wall. 1; The Genessee Chief, 12 How. 44; Jackson v. The Magnolia, 20 How. 296."

The English admiralty has exercised jurisdiction over many non-maritime cases. The jurisdiction of our own admiralty to that extent at least was precluded by the grant. "The limits of the jurisdiction are to be ascertained by a reasonable and just construction of the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." (Vol. I, Benedict on Admiralty, 6th Ed., p. 7; see, also, *The Lottawanna* (1874), 88 U. S. 558, 576.) "The constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. Boundaries were to be determined in the exercise of the judicial power in recognition of the purpose of the grant." (*The Thomas Barlum* (1934), 293 U. S. 21, 43, 55 S. Ct. 31, 38.)

In the leading case of *The Lottawanna, supra*, the court pointed out (p. 572) that the maritime law "is only so far operative as law in any country as it is adopted by the laws and usages of that country." And further on the same page the court said:

> "But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope. Whilst it is true that the great mass of maritime law is the same in all commercial countries, yet, in each country, peculiarities exist either as to some of the rules, or in the mode of enforcing them. Especially is this the case on the outside boundaries of the law, where

it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed —as, in justice, it should be. No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third; still, the convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those relations bring them in contact, there should be a uniform law founded on natural reasop and justice."

And on page 573 the court continued:

"This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole. The government of one country may be willing to give to its citizens, who supply a ship with provisions at her home port where the owner himself resides, a lien on the ship; whils' that of another country may take a contrary view as to the expediency of such a rule. The difference between them in a matter that concerns only their own citizens, in each case, cannot seriously affect the harmony and consistency of the common maritime law which each adopts and observes."

Then on page 574 the court further said:

"That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was fami-

fair to the lawyers and statesmen of the country when the constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary."

And on page 575 the court continued:

"One thing, however, is unquestionable; the constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country."

And on page 576 the court continued:

"Guided by these sound principles, this court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited to it in England, but which fairly belonged to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to effect it.

"To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed."

With regard to changes that might be made in the maritime law the court said on page 576:

"But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."

In *The Western Maid* (1922), 257 U. S. 419, 432, 42 S. Ct. 159, 160, the court said:

> "In deciding this question we must realize that however ancient may be the traditions of maritime law, however divers the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules."

And, finally, in *Alaska Packers Association v. Marshall* (C. C. Cal. 1938), 95 Fed. (2d) 279, 282, the court said:

> "Admiralty law is not conceived as a sacrosanct scientific sovereign nor is non-conformance at any place in navigable waters lese majeste."

The maritime law of this country and the jurisdiction of admiralty in this country is, therefore, such of the general maritime law and such of admiralty jurisdiction as has been accepted and received by this country by force of judicial decision, the acts of Congress and such alterations, additions or amendments thereto as have been made by acts of Congress.[37] (*The Lottawanna, supra,* and *The Thomas Barlum, supra.*)

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[37] See, also, *Southern Pacific Co. v. Jensen* (1916), 244 U. S. 205, 215, 37 S. Ct. 523, 529. On page 216 of the U. S. Reports the court stated that it "would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."

The next step in our analysis leads us to the question whether control and regulation of fishing on navigable waters within the borders of the state has ever been, by judicial decision, interpreted to have been received and accepted as part of our maritime law, or whether it has been made so by acts of Congress.

B-3. CONTROL OF STATE FISHERIES IN BOTH SUBSTANTIVE AND REMEDIAL ASPECTS HAS NEVER BEEN ACCEPTED OR RECEIVED AS WITHIN THE JURISDICTION OF ADMIRALTY OR AS PART OF OUR MARITIME LAW.

Regardless of what control may have been exercised by the English admiralty over the fisheries of that country, or how firmly imbedded in the general maritime law such control may have been, it is certain that this feature of the general maritime law, if it existed at all, has never been accepted and received by the United States in so far as the territorial waters of the States are concerned. Congress has made no effort to enlarge the scope of the maritime law so as to include it, and only Congress can change the maritime law originally adopted. (*The Lottawanna, supra.*) Whether Congress could do so is beside the point.[38] Not having been originally accepted as part of our maritime law and never having been by act of Congress included therein, such control and regulation is purely non-maritime, as that term is used in considering

[38]In *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382, the validity of the Act of 1918 giving effect to the Migratory Bird Treaty of 1916 was upheld under the treaty making power. Prior to the treaty, an act of Congress attempting to regulate the killing of migratory birds within the borders of the states was held unconstitutional in the District Court. (*United States v. Shauver* (1914), 214 Fed. 154; *United States v. McCullagh* (1915), 221 Fed. 288.)

the grant, and is therefore not within the jurisdiction of admiralty to enforce. It is also significant that Congress has never attempted to include within the jurisdiction of admiralty or *any* Federal court control over the State fisheries.

That such control and regulation has always been considered as purely local to the state cannot be seriously questioned at this late date.[39] Therefore, the control of fisheries within the borders of the state, from the standpoint of substantive law, has never been a part of our maritime law and is clearly of non-maritime concern.

The foregoing proves beyond doubt the cause here in its substantive aspect to be non-maritime and in the remedial to be beyond the jurisdiction of admiralty. Petitioners say, however, that admitting it to be non-maritime in the substantive sense, admiralty has jurisdiction simply because the statute contemplates a proceeding against the net after seizure on navigable waters; that such a proceeding is *in rem* and enforceable only in admiralty. What we have said on the subject should be sufficient, but we shall examine it further in the light of petitioners' contention.

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[39] *Miller v. McLaughlin* (1930), 281 U. S. 261, 50 S. Ct. 296; *Thomson v. Dana* (D. C. Ore. 1931), 52 Fed. (2d) 759, 762, affirmed 52 S. Ct. 409; *Bayside Fish Flour Co. v. Gentry* (1936), 297 U. S. 422, 426, 56 S. Ct. 513, 515; *Manchester v. Massachusetts* (1891), 139 U. S. 240, 260, 11 S. Ct. 559, 563; *McCready v. Virginia* (1876), 94 U. S. 391, 394; *Smith v. Maryland* (1855), 59 U. S. 71; *The Elexena* (D. C. Va. 1892), 52 Fed. 359, 362; *The Abby Dodge* (1911), 223 U. S. 166, 32 S. Ct. 310; *Lawton v. Steele* (1894), 152 U. S. 133, 139, 14 S. Ct. 499, 501; *Mirkovich v. Milnor* (D. C. Cal. 1940), 34 Fed. Supp. 409, 413; *Corfield v. Coryell* (C. C. Pa. 1823), Fed. Cases No. 3230, p. 552.

B-4. If the Right of Substantive Control Is Non-Maritime There Is No Jurisdiction in Admiralty to Apply the Remedy.

No authority has come to our attention holding that the enforcement of a non-maritime cause is of admiralty cognizance under any circumstances. Any number of cases hold that if the cause of action is non-maritime admiralty has no jurisdiction. If jurisdiction depends upon the character of the cause and if the cause, as here, is non-maritime, how can there be jurisdiction any more than in the enforcement of any other non-maritime cause? The mere fact that the remedy is by a proceeding in the nature of one *in rem* certainly is not determinative.

Petitioners repeatedly refer to the net in this case as "the offending thing" and reiterate that the proceeding against it for forfeiture as a penalty partakes of a conventional proceeding *in rem* in admiralty. True, in one respect the net is "the offending thing", but the proceeding to forfeit it is not of the character of the ordinary action *in rem* in admiralty. The true proceeding *in rem* in admiralty has its foundation in the maritime lien whereby the vessel is theoretically hypothecated for the benefit of those who serve her the moment work begins, and likewise hypothecated for torts of a maritime nature committed by or on her. (*The J. E. Rumbell* (1892), 148 U. S. 1, 9.) No such lien exists here against the net or the vessel by the maritime law or otherwise. This feature is more fully dealt with under Point 1, *supra*.

Then it is said by petitioners (Br. p. 14) that because the seizure took place on navigable waters there exists "the conjunction of a maritime *res* and a maritime *situs* of the seizure, which makes the cause of action a cause of ad-

miralty cognizance." That argument begs the question, for it overlooks entirely the genesis of the right to seize. We shall presently show that if the seizure is for violation of federal law authorizing seizure and forfeiture, then jurisdiction is now and always has been of admiralty cognizance by virtue of the constitutional grant of jurisdiction.

In support of their claim that the place of seizure controls the question of jurisdiction; that the fact of seizure creates a "cause of seizure," petitioners cite *Rose v. Himely* (1808), 8 U. S. 240, 4 Cranch; that "every violent dispossession of property on the ocean is, *prima facie*, a maritime tort; as such, it belongs to the admiralty jurisdiction." *The L'Invincible* (1816), 14 U. S. 238, 257, 1 Wheat., is cited in support of the latter claim. Both of those cases were prize cases which have always been part of the maritime law, or at least within the admiralty jurisdiction accepted in this country. Such cases are decided according to the law of nations, and arise now only by capture made by national vessels and a proceeding *in rem* commenced in the name of the United States by the United States District Attorney. (4 Benedict on Admiralty, 6th Edition, p. 318 *et seq.*)

It is said that violations of revenue laws arise out of non-maritime transactions but that the place of seizure nevertheless controls the jurisdiction, citing *La Vengeance* (1796), 3 U. S. 297, 3 Dall.; *The Sally* (1805), 6 U. S. 405, 2 Cranch; *The Betsey and Charlotte* (1808), 8 U. S. 442, 4 Cranch; and *The Sarah* (1823), 21 U. S. 390, 8 Wheat.

None of those cases have a bearing on any question involved here. They were all concerned with violations of Federal law, jurisdiction of which in cases of seizure

on navigable waters was given by the Judiciary Act of 1789 exclusively to courts of admiralty.[40]

In *The Eagle* (1868), 75 U. S. 15, 26, this Court held with reference to the portion italicized in the footnote, that it was included by force of the general grant of admiralty jurisdiction; that "the general jurisdiction in admiralty exists without regard to it"; and that it was therefore "useless and of no effect."

Upon the revision of the statute in 1872, the italicized portion was therefore omitted. (Vol. 6, Benedict on Admiralty, 6th ed., p. 328, section 14; Revised Statutes, Sec. 711.)

The place of seizure does control so far as violation of laws of the United States penalizing such violation by forfeiture of the vessel, but we are unaware of any authority, and petitioners have cited none, holding that for violation of a *state fishing law*, over which admiralty has no jurisdiction, the fact of seizure alone on navigable waters of the state vests admiralty with jurisdiction.

It is not the fact and *situs* of seizure that controls, but whether the seizure is made pursuant to process issued for enforcement of a maritime right or redress of a

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[40]Section 9 of the Judiciary Act of 1789 (1 Statutes at Large, p. 76), provided in part:

"That the district court shall have, . . . exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, *including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more burthen, within their respective districts as well as upon the high seas;* saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of the United States." (Italics ours.)

maritime wrong or because of violation of *Federal* law authorizing seizure and forfeiture.

There should be no doubt that the right of state control over its fisheries is non-maritime. The seizure and subsequent proceeding *in rem* to enforce a forfeiture under such a state law no more confers jurisdiction upon admiralty to enforce than does any other proceeding *in rem* for violation of a non-maritime right.[41]

It is also argued (Br. p. 16) that "the gist of the action in this cause was to try the legality of the act of the state's enforcement officers in seizing the respondent net from the RELIANCE on the navigable waters." On the contrary, as in any forfeiture case, the gist of the action is whether the act permitting forfeiture was committed. Whatever may be the rule under other circumstances, in a non-maritime cause such as this any rule of procedure in admiralty has no application.

Proceedings *in rem*, after seizure on navigable waters for violation of revenue laws, *e.g.*, the Prohibition Act, etc., have always been in admiralty. These are for violation of Federal or national law, and it has always been one of the ancient rights of admiralty to entertain jurisdiction of such proceedings. Such was the ancient admiralty jurisdiction accepted and received in this country,[41a] but nowhere is there to be found authority for the proposition that such a theory of maritime law, as applied to the regulation of state fisheries, has ever been announced

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[41] *Knapp, Stout & McCaffrey Co.* (1899), 177 U. S. 638, 642, 643, 647, 20 S. Ct. 824; *The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Bee* (1914), 216 Fed. 709; *The Belfast* (1868), 74 U. S. 624, 645; *Martin v. West* (1911), 222 U. S. 191, 196, 32 S. Ct. 42.

[41a] *The Eagle* (1868), 75 U. S. 15, 26.

or accepted. Those cases having to do with forfeitures of vessels under Federal law are wholly distinguishable. The ancient jurisdiction of admiralty with regard to violations of Federal law is stated in the leading case of *De Lovio v. Boit* (1815), 2 Gall. 398, 467 (Federal Cases No. 3776), where Mr. Justice Story said that the jurisdiction extended to all "offenses."

Early in our history the cases of *La Vengeance*, etc., paved the way and settled the rule to be that, for violation of Federal law, proceedings *in rem* to forfeit a vessel pursuant to that law, if the seizure were made on navigable waters, was within the jurisdiction of admiralty.

We anticipate that the court may inquire as follows: Conceding that control of state fisheries has never been accepted or received in this country as part of our maritime law or within the jurisdiction of admiralty, does not a proceeding to forfeit a net *in rem* for violation of such a state law fall within the exclusive jurisdiction of admiralty, for the same reasons that enforcement *in rem* of certain state laws creating maritime rights which are not part of our maritime law must nevertheless be enforced in admiralty? The answer must be in the negative upon the basis of the same general principles heretofore stated.

Maritime rights created by state legislation, enforceable *in rem* only in admiralty, were maritime because considered local, "border legislation" and on the "outside boundaries" of the general maritime law "where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other." (*The Lottawanna* (1874), 88 U. S. 558, 572.) Such rights were nevertheless maritime because "within a

sphere restricted by the concept of the admiralty and maritime jurisdiction". (See *The Thomas Barlum* (1934), 293 U. S. 21, 44, 55 S. Ct. 31, 38; *The Lottawanna*, 88 U. S. 558, 576.) and therefore a subject or right which Congress could include as part of the maritime law of this country. Because Congress had not so acted, the states were permitted to create them for the reason that in so doing none of the expressed purposes of any Act of Congress were violated; no material prejudice resulted thereby to the general characteristics of the general maritime law in its interstate or international relations. (See *Southern Pacific Co. v. Jensen* (1916), 244 U. S. 205, 216, 37 S. Ct. 523.) The rights so created *had not before existed* by the general maritime law or by the maritime law of this country. However, being so closely allied to the general maritime law—on the "outside boundaries" of it—and subject to inclusion by Act of Congress, those rights could only be enforced *in rem in admiralty*. (See *The J. E. Rumbell* (1892), 148 U. S. 1, 11 *et seq.*, 13 S. Ct. 498; *The Lottawanna*, *supra*.)

In the case of State fisheries the right of control had *always* existed exclusively in the states and when state legislation was enacted in regulation thereof no new right was created. The right had always remained with the states and was not surrendered to the Federal Government by the grant of admiralty and maritime jurisdiction. (*Corfield v. Coryell* (C. C. Pa. 1823), Federal Cases No. 3230.) Thus such control never became part of our maritime law and so far as the constitutional grant is considered never became the subject of Federal control except to the extent of the paramount power to regulate navigation. (*McCready v. Virginia* (1876), 94 U. S. 391.) Not ever having been interpreted by judicial de-

cision to be part of our maritime law it is not and never has been part of it; nor up to the present time subject to inclusion therein by Act of Congress. There lies the principal point of difference between state laws regulating their fisheries and state laws held to be "border legislation", and enforceable *in rem* only in admiralty. State control of its fisheries has been held exclusive in the state and up to the present time not subject of regulation by Congress. (See *U. S. v. Shauver* (D. C. Ark. 1914), 214 Fed. 154; *U. S. v. McCullagh* (D. C. Kan. 1915), 221 Fed. 288. See, also, *Missouri v. Holland* (1920), 252 U. S. 416, 40 S. Ct. 382.) It necessarily follows then that up to now such control creates a *non-maritime* right in the state of which admiralty has no jurisdiction for enforcement.

We do not mean to say that such control could never be exercised by Congress and thereby be included as part of our maritime law, only that up to now has not been. Conditions may arise, unforeseen now by anyone, whereby such control becomes necessary to preserve the harmony and uniformity of the maritime law. But those conditions have yet not presented themselves. Congress has so considered, as witness the fact that it has made no attempt in that direction, and only Congress could (other things being equal) so include it now, for it was excluded at the start of our government from our concept of maritime law or admiralty jurisdiction. (See *The Lottawanna*, *supra*, at page 576.)

No decision has ever been rendered with which we are familiar holding or intimating that admiralty has jurisdiction of proceedings *in rem* to forfeit a vessel after seizure on navigable waters of the State for violation of

a non-maritime right in the State created by valid State law. In fact in *Knapp, Stout & Co. v. McCaffery* (1899), 177 U. S. 638, 642, 20 S. Ct. 824, 826, this court said:

"The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: that wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty courts.

"But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction, The Jefferson, (*People's Ferry Co. v. Beers*), 20 How. 393; The Capitol, (*Roach v. Chapman*), 22 How. 129, we held in *Edwards v. Elliott*, 21 Wall. 532, that, in respect to such contracts, it was competent for the states to enact such laws as their legislatures might deem just an expedient, and to provide for their enforcement *in rem*. The same principle was applied in *Johnson v. Chicago & C. Elevator Co.*, 119 U. S. 388, to a statute of Illinois giving a lien upon a vessel for damage done to building abutting on the water, upon the ground that the court had previously held that there was no jurisdiction in admiralty for damage done by a ship to a structure affixed to the land. *The Plymouth*, 3 Wall. 20; *Ex parte Phoenix Ins. Co.*, 118 U. S. 610. There was really another sound reason for the decision in the fact that the suit was *in personam*, with an at-

tachment given upon the property of the defendant, which, as we shall see hereafter, is quite a different case from a proceeding *in rem*.

"To establish the proposition that the proceeding in this case was an invasion of the exclusive jurisdiction of the admiralty courts defendants are bound to show, first, that the contract to tow a raft is a maritime contract; second, that the proceeding taken was a suit *in rem* within the cases above cited, and not within the exception of a common law remedy, which section 563 was never designed to forestall."

On page 647 of the opinion, this Court, in referring to the decision in the case of *Johnson v. Chicago etc. Elevator Co.*, 119 U. S. 388, said, first quoting from the *Johnson* case, and then making an observation of its own:

"• • • 'There being no lien on the tug by the maritime law for the injury on land inflicted in this case, the state could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce.' *It would seem that even if the suit had been in rem against the vessel, it would have been sustained, as the injury was not one for which an action would have lain in admiralty.*" (Italics ours.)

In *Knapp, Stout & Co. v. McCaffrey, supra*, the court stated specifically that the state law gave rise to a non-maritime transaction. Such law could likewise provide for a lien to be enforced *in rem* against the vessel itself and two conditions must exist before a state law may be held to invade the jurisdiction of admiralty: 1. That the cause of action is maritime, and 2. that the proceeding taken is a suit *in rem*.

In *The Winnebago* (1906), 205 U. S. 354, 362, 27 Sup. Ct. 509, a contract to build a vessel—a non-maritime contract—was involved. *After the vessel was launched and while in the water* work on the contract continued. Thereafter she made several voyages until "a claim of lien against the steamer," (p. 356) was filed in the state court for work and materials furnished after launching and prior to enrollment and issuance of a license to engage in trade. The Michigan statute under which the lien was claimed provided that for certain services, etc. (p. 359):

> "Every water craft of above five tons burthen, used or intended to be used, in navigating the waters of this State, shall be subject to a lien thereon."

On page 360 the court said:

> "It is further contended that to seize the vessel and subject her to sale and the proceeds thereof to distribution in the state court would be in direct conflict with the exclusive jurisdiction in admiralty in the courts of the United States in favor of liens of a maritime character, and therefore the Michigan Act is unconstitutional. No maritime lien is asserted in this case, and it is merely a matter of speculation as to whether any such claim existed, or might be thereafter asserted. No holder of any such maritime lien is here contesting the constitutionality of the state law."

It was then pointed out that maritime liens, if any there were, would be superior to the State lien and would be enforceable only in admiralty, which would not in the least be obstructed by the action of the State court and that title under a decree of a court of admiralty would defeat the

title gained in the State court. Then it was said on page 362:

> "It is next objected that the court erred because certain items were allowed for material furnished the vessel after she was launched, and therefore the subject of exclusive jurisdiction for which a lien could only be enforced in the admiralty. But we agree with the state court that these items were really furnished for the completion of the vessel and were fairly a part of her original construction. In such a case the remedy was within the jurisdiction of the state court."

And on the same page:

> "But it must be remembered that concerning contracts not maritime in their nature, the State has authority to make laws and enforce liens, and it is no valid objection that the enforcement of such laws may prevent or obstruct the prosecution of a voyage of an interstate character."

In *The Belfast* (1868), 74 U. S. 624, after repeating the rule that State courts do not have authority to hear and determine a suit *in rem* in admiralty to enforce a maritime lien, the court said on page 645:

> "Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement."

In *Westfall Larson & Co. v. Allman-Hubble Tug Boat Co.* (C. C. A. 9th, 1934), 73 Fed. (2d) 200, a suit was

commenced in the state court "against the Brimanger," a motor ship, to establish a lien thereon pursuant to state statute for damage to a bridge and power cable caused by the vessel. (See opinion of state court in *Grays Harbor Co. v. The Brimanger*, Wash. 1933, 18 Pac. (2d) 25.) Judgment resulted in favor of the plaintiff, City of Aberdeen. At the time of the collision the vessel was being towed by defendants in the present case. The owners of the vessel, who were defendants in the state court proceeding, paid the judgment and then filed a libel in admiralty in the District Court against the defendant in the present action to recover for damage done to the vessel itself. On page 204 the court said:

> "There can be no doubt that the damage inflicted by the Brimanger upon the bridge and the power cables constituted a nonmaritime tort."

The libel was consequently dismissed because, being a non-maritime tort, admiralty was without jurisdiction. The case recognizes the validity of the state law imposing a lien and permitting enforcement of it against the vessel by name in the state court.

In *Martin v. West* (1911), 222 U. S. 191, 32 S. Ct. 42, it appeared that the steamer Norwood, owned and enrolled in San Francisco, collided with a pier of a toll drawbridge near Aberdeen, Washington, on the Chehalis River, a navigable stream flowing into the Pacific Ocean. Damage was done to the pier and the cause was negligence of the master. A suit was brought in the state court against

the owners of the vessel to assert and enforce a lien given by state law. Judgment went for the plaintiff. The state law provided that (p. 196):

> "Sec. 5953. All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable,
>
> " '. . . .
>
> " '6. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state.
>
> " 'Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued.
>
> " 'Sec. 5954. Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court of this territory.' "

This Court ignored the provision of the statute that denominated the action in the state court "a suit in admiralty" and said on page 197:

> "As the bridge was essentially a land structure, maintained and used as an aid to commerce on land, its locality and character were such that the tort was non-maritime, . . . and, consequently, it was ad-

missible to pursue in the state court the remedy provided by the state statute, even though that law gave a lien on the vessel. Johnson v. Chicago & Pac. Elevator Co., *supra;* Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638; The Winnebago, *supra.*"

In *The Bee* (D. C. Ore. 1914), 216 Fed. 709, an action was brought in the state court under a lien law of the state against the steamship Bee to recover damages for personal injury. The case was removed to the Federal Court because of diversity of citizenship. The court said on page 710, *et seq.:*

"The cause of action as made by the complaint is not a maritime tort of which courts of admiralty have jurisdiction. The consummation of the wrong having taken place on land and not on navigable water, and the cause of action not having been consummated on such water, there is therefore no lien on the boat under the maritime law. . . .

"The lien sought to be enforced, if it exists at all, is non-maritime and created by the state statute, and is enforceable according to the statutory method prescribed by the state law and the rules of evidence and procedure applicable thereto. Johnson v. Chicago, etc., Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447. The case is here by reason of diversity of citizenship, and not as a proceeding in admiralty.

"The facts stated in the complaint would bring the case within the provisions of the employers' liability

law if the action was *in personam* against the owner of the vessel, but it is contended by the defendant: (1) that the boat lien law has no application to the case made by the complaint because the injury complained of was not done by the 'boat or vessel' within the meaning of the law; (2) that the Oregon Employers' Liability Act does not apply to actions brought against a boat to enforce a lien given by the state statute; and (3) that the defendant vessel is owned in California, and the law of that state governs the relations between the vessel and her owners on the one hand, and the employees of the ship on the other, and that under such law the mate, whose negligence it is alleged caused the injury, was a fellow servant with the plaintiff, for whose act neither the vessel nor her owner is liable."

On page 711 the court continued:

"(2) The remedy provided by the state law for enforcing the lien given by the statute is an action against the boat or vessel by name, rather than *in personam* against the owner (section 7506, Lord's Ore. Laws), but after the seizure of the vessel and the return of the warrant that proceedings are to be had against the vessel in the same manner as if the action had been commenced against the person on whose account the damages accrued (section 7509). And if an issue of fact be joined the same proceedings shall be had as in other actions. Section 7511. This being so it would seem to follow that the trial should be governed and the liability of the parties

determined by the same rule as if the action were *in personam* against the owner; . . . " .

The foregoing cases clearly establish that if the transaction involved is non-maritime, then admiralty is without jurisdiction in any event, though the state law permits a proceeding against the vessel itself following a seizure upon navigable waters within the territory of the state. The same rule would of course apply in the case of a net, part of the vessel's equipment.

The distinguishing feature of a proceeding *in rem* against a vessel or its equipment is that admiralty acquires jurisdiction to give a valid title as against the world. A proceeding under the state law here is not to pass title or try title as that term is usually employed, rather is it a proceeding to forfeit title and interest for a violation of law which upon judgment of condemnation relates back to the time of commission of the offense[42] and does not purport to and could not foreclose the rights of those having martime claims.[43]

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[42]See, *United States v. Grundy* (1806), 7 U. S. 337, 350, 3 Cranch.

[43]*The Winnebago* (1906), 205 U. S. 354, 360, 362, 27 S. Ct. 509; *The Elexena* (D. C. Va. 1892), 53 Fed. 359.

Conclusion.

We submit that the foregoing authorities and analysis clearly demonstrate that:

1. The remedy of forfeiture provided by the state law here under review is a common law remedy which the common law is competent to give, bringing it squarely within the saving clause of the Judicial Code, for the reasons following:

(a) The common law of California consists of the *lex non scripta* and the Acts of Parliament amendatory thereof existing prior to the American Revolution; and,

(b) The Statute of 12 Car. II, c. 18 (1660), as construed by the common law courts of England, provided a common law remedy by a proceeding *in rem* for the forfeiture of vessels used in violation of that statute.

2. The said remedy is not a "proceeding *in rem* according to the course of admiralty" in that it does not arise out of a maritime lien, nor does a decree rendered pursuant to its exercise "bind all the world."

3. The cause of action invoked upon a violation of the state law here under review is non-maritime, and the remedy of forfeiture is not within the jurisdiction of admiralty to enforce, because:

(a) This Court so held in *Smith v. Maryland*, *supra*, a decision which this court has never overruled in any subsequent case; and,

(b) The body of the maritime law of this nation, as well as its admiralty jurisdiction, is that and that only which has been "accepted and received," as the same is interpreted by judicial decision and added to by Act of Congress.

(c) The control of state fisheries has never been accepted and received as part of this nation's maritime law or as within the jurisdiction of admiralty, and is therefore of non-maritime concern.

(d) Being of non-maritime concern, admiralty is without jurisdiction to enforce it, by a proceeding *in rem* or otherwise.

Respectfully submitted,

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EVERETT W. MATTOON,
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 60.

C. J. HENDRY COMPANY and FRANK SEMATOVICH,
Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California,
Respondents.

PETITION FOR REHEARING OF CAUSE.

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Supreme Court of the United States

OCTOBER TERM, 1942.

C. J. HENDRY COMPANY and FRANK SEMATOVICH,
Petitioners,

vs.

E. C. MOGAN, I. ZELLERBACH and A. T. JEFFERYS, as the Fish and Game Commission of the State of California,
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No. 60.

PETITION FOR REHEARING OF CAUSE.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, C. J. Hendry Company and Frank Sematovich, hereby respectfully petition the Court that the judgment herein be vacated and a rehearing of the cause be granted upon the following grounds:

1. The decision of the Court that a remedy *in rem* is saved to suitors in state courts in causes of maritime seizure for forfeiture under state laws, is contrary to the decisions of this Court in *La Vengeance*, 3 Dall 297, and many other cases, and to the expressed intent of the first Congress which enacted the Judiciary Act of 1789.

2. The decision of the Court, determinating the existence of an exception to the *Moses Taylor* rule, 4 Wall. 411, in causes of maritime seizures and forfeitures, destroys the principle upon which the rule rests, for if the exchequer

NOTE: The italics in quotations herein have been supplied.

remedy *in rem* is a common law remedy, the common law is competent to give a remedy *in rem* in any maritime cause wherein the admiralty is competent. And if a remedy *in rem* to foreclose a maritime lien is not a common law remedy, neither is the exchequer remedy. The saving clause saves common law remedies, not remedies in common law courts.

3. Considerations of public interest and expediency militate against the overruling of *La Vengeance* principle and the destroying or weakening the principle of the *Moses Taylor*.

For these reasons, herein to be expanded and explained, the petitioners respectfully represent that the decision herein is unsound and should be reconsidered upon a rehearing of the cause.

POINT ONE.

As to any matter involved in this case, there can be no valid distinction between causes of forfeiture under the laws of a state and under laws of the United States, nor between the jurisdiction of state courts, and that of the federal courts on the non admiralty side. Any cause for penalty or forfeiture, based upon a seizure on navigable waters, is a cause of admiralty cognizance, and jurisdiction in any non admiralty forum, state or federal, can only rest upon the permissions of the saving clause in section 9 of the Judiciary Act of 1789, as amended.[1] The common law remedy is not saved to states or to state courts, but to suitors in admiralty causes. It is saved in all non admiralty courts.

And, whether the right to a penalty or forfeiture is a right in the United States or in a state authority, the basis

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[1] *Waring* v. *Clark*, 5 How. 441; 460-461; *The Belfast*, 7 Wall. 624; 644.

of the right and the incidents of its enforcement are identical. All sovereign power was inherent in the states, and the power to declare penalties and forfeitures for violation of municipal regulations is merely an attribute of sovereignty. As to some subjects of municipal regulation, such as foreign commerce and trade, national revenues and the regulation of navigation, the states have ceded their powers to the national government. As to the other subjects of regulation, the states retained sovereignty. But whether ceded or retained, all rights of penalty or forfeiture flow from sovereignty.

When the states ceded the jurisdiction of admiralty and maritime causes, they ceded the whole of it, without reservation as to place or subject.[2] Nothing was held back. The absolute dominion and control of causes of admiralty and maritime cognizance passed with the constitutional grant, and non admiralty remedies are only available in other courts by the grace of Congress.

These preliminary points, the verity of which cannot be subject to doubt, are presented here to show that in matters affected by the admiralty grant and the acts of Congress fixing the jurisdiction of courts to afford remedies in admiralty causes, there can be only one rule of decision, whether the suitor be the United States, a state, or a private individual, and that any inhibition or limitation of remedy which bars the United States as a suitor, must likewise bar a state or a private suitor. Conversely, the United States, as suitor, acquires under its own laws, no wider remedial privileges than a state or an individual. The Judiciary Act does not discriminate in any respect, as to any suitor, in a cause of admiralty cognizance.

When this Court, final arbiter of the propriety of remedies in admiralty causes, holds that a certain remedy is or

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[2] *Jackson* v. *The Magnolia*, 20 How. 296.

is not a common law remedy under the saving clause, that adjudication must be applicable to all suitors in all non admiralty courts. If the remedy is unavailable to the United States, it must follow that it is unavailable to a state, and vice versa. It must be, therefore, that the decision in this cause, directly holding that the exchequer remedy in rem is a common law remedy within the intention of the saving clause, makes the remedy available, not only to the states in state courts, but to the United States on the law side of the federal courts. And when (as this Court repeatedly held between 1796 and 1825) it was adjudicated, that the exchequer remedy was *not available* to the United States as a suitor in the district courts, the principle must apply to a state, suing in its own courts.

We submit, therefore, that the decision at bar squarely overrules the cases of *La Vengeance*, 3 Dall 297, and the long line of cases which follow it; and that from the date of this decision, it must be understood that maritime causes for forfeiture, state or federal are triable by a proceeding *in rem* at law, with the right of trial by jury.

That conclusion seems to us unescapable, under the present decision, but, without further assurance, we cannot believe that this Court intended to cast aside after 150 years, the heretofore unquestioned *exclusive* jurisdiction of admiralty in federal causes of seizure for penalty and forfeiture under the laws of the United States. Yet if there is a concurrent remedy for a state as a suitor, the United States must also have it.

The majority opinion teaches that a remedy *in rem* according to the course of the English exchequer was triable by jury, and was a well known and well established remedy in the common law courts of England and in America at the time of the adoption of the constitution. In the

light of the Court's exhaustive researches, that cannot be gainsaid. But, fully admitting its existence and prevalence prior to 1789, contemporary evidence is overwhelming that the first Congress and the Justices of this Court in the four decades following the enactment of the Judiciary Act, were thoroughly familiar with it, well understood its legal and political history, and consciously and intentionally *rejected it* as a common law remedy such as was intended to be saved by the saving clause.

The strongest evidence comes in the decisions of this Court, whose then Justices were the contemporaries of the framers of the constitution and of the members of the first Congress. Great lawyers all, and representing, during the ensuing quarter century, all schools of legal and political thought, they had first hand knowledge of the problems of the day which the new government was designed to solve. The data on the extent of pre-constitutional jurisdiction of the colonial courts, which the Court, today, has had to develop by research into obscure sources, was fresh and current to them. Undoubtedly the exchequer remedy, and the concurrent remedy in the vice admiralty courts had been a fairly common incident in their practices. And they must have known far better than anyone can today, what the first Congress meant by the clause:—saving to suitors a common law remedy.

In *La Vengeance* and *The Sally* (2 Cranch 406), it was urged to the Court that the remedy of maritime forfeiture should be tried by jury; and this position was urged by the United States Attorney who spoke with the voice of the suitor. He argued in *La Vengeance* (p. 300) that the mere institution of a new mode of proceeding (admiralty) did not rescind or annul the pre-existing process applicable to the same subject. Unquestionably, he referred to the exchequer remedy. But the Court, squarely confronted with

this exchequer remedy, held that it was not available; and that the cause was not triable by jury. The same holding followed in *The Sally*. It cannot be, we submit, that this Court, with the new legislation and the saving clause squarely before it, could have so decided those cases without squarely rejecting the exchequer proceeding *in rem*, as falling within the category of "a common law remedy which the common law is competent to give".

If there is any possibility that the situation had not been fully explored in *The Vengeance* and *The Sally*, the next case leaves no doubt. In *The Betsey & Charlotte*, 4 Cranch 443, the reports of the argument and the decision of the Court show that every possible point against the exclusive jurisdiction of admiralty was presented, considered *and rejected*.[3]

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[3] Mr. Lee: "The proceedings ought to have been according to the course of the common law and the facts ought to have been tried by a jury" (p. 444). "All seizures in that country (England) for violation of the laws of revenue, trade and navigation are tried by a jury in the court of exchequer *according to the course of the common law*. There is nothing in the course of proceedings *in rem* which requires that they should be in a court of admiralty. A court of common law is as competent to the trial of such cases as a court of admiralty" (pp. 447-8). "Congress had no such intention for in the same breath they say: 'saving to suitors the right of a common law remedy where the common law is competent to give it.' We have seen that in cases of seizure for breaches of the laws of revenue, trade or navigation, the common law is competent to give a remedy, and this suitor is entitled to it. The several acts of Congress creating forfeitures for breaches of the laws of revenue, etc., all seem to refer to the exchequer practice rather than to that of the admiralty" (p. 449). But the court thought otherwise:

Chief Justice Marshal: "It is the place of seizure, and not the place of committing the offense which decides the jurisdiction. . . . It is clear that Congress meant to discriminate between seizures on waters navigable from the sea and seizures on land or upon waters not navigable, and to class the former among the civil causes of admiralty and maritime jurisdiction.

The only doubt which could arise would be on the clause of the Constitution respecting the trial by jury. But the case of the Vengeance settles that point" (p. 452).

Other cases followed, affirming and reaffirming the principle,[4] until, by 1825, the rule of *La Vengeance* was accepted as proof against attack, and became part of the backlog of unimpeachable authority, accepted by its proponents and opponents as one of the verities of the law.[5]

This Court states in the majority opinion that it has never *said or held* that the admiralty jurisdiction in maritime seizures was exclusive[6] but that conclusion does not seem to square with the decisions of this Court in *La Vengeance* and *The Sally*. Therein, the suitor claimed the right to try the cause with a jury, and pointed directly to the saving clause and the exchequer remedy *in rem* with the right of trial by jury. This Court unqualifiedly denied the right, which seems to us conclusive that it could see no concurrent remedy under the saving clause or otherwise. It must be that in these many cases, the Justices of this Court saw the exchequer proceeding *in rem*, not as a common law remedy under the saving clause, but as a civil law remedy, cognizable in *courts* of common law, born of

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[4] *Whelan* v. *United States*, 7 Cranch. 112; *The Samuel*, 1 Wheat. 9; *The Sarah*, 8 Wheat. 391; *The Margaret*, 9 Wheat. 421.

[5] *Waring* v. *Clark*, 5 How. 441; 458; *The Confiscation Cases*, 7 Wall. 454; 462; *The Eagle*, 8 Wall. 15; 26.

"Again, this court decided as early as 1805 (2 Cranch. 405) in the cases of *The Sally*, that the forfeiture of a vessel under the act of Congress against the slave trade was a case of admiralty and maritime jurisdiction, *and not of common law*. And so it had done before in the case of *La Vengeance*, 3 Dall. 397." Justice Wayne in *Waring* v. *Clark*, *supra*, p. 458.

[6] Opinion, p. 15. But this Court *has* said that there is no form of action at common law, which, when compared with the proceeding *in rem* in admiralty, can be regarded as concurrent remedy. *The Belfast*, 7 Wall. 624; 644. And in *Rounds* v. *Cloverport Foundry*, 237 U. S. 303; 306, the court said: "The proceeding *in rem, which is in the exclusive jurisdiction of admiralty*, is one essentially against the vessel itself as the debtor *or offending thing*,—in which the vessel is itself seized and impleaded as the defendant, and is judged and sentenced accordingly."

the ancient civil jurisdiction of the revenue side of the exchequer.

The first Congress was definitely "seizure and forfeiture conscious" as is demonstrated by the fact that the original 9th Section of the Judiciary Act deals with them specifically in three separate clauses.[7] So sure was Congress that it wanted nothing of the exchequer remedy with its jury trials in the new admiralty jurisdiction, that it specifically included causes of maritime seizures in the grant of admiralty jurisdiction to the district courts. It even included seizures on the navigable rivers. A cause of seizure *must* be a cause *in rem*. No reason can be suggested for this inclusion except to make these causes exclusively triable by the process of admiralty and not by a jury remedy,[8] and why should the congress have taken those pains, if, by the saving clause, the jury remedy was to be made available in the form of a concurrent remedy?

Guided by later decisions of this Court[9] we know now that this precaution of Congress added nothing to the grant of admiralty jurisdiction and that the inclusion of juris-

[7] Sec. 9. That the district courts shall have . . . *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, *including all seizures* under the laws of impost navigation or trade of the United States where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as on the high seas, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred under the laws of the United States; . . . And the trial of issues of fact in the district courts in all causes *except* civil causes of admiralty and maritime jurisdiction shall be by jury.

[8] "The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprice of juries." Justice Chase in *The Betsey and Charlotte*, 4 Cranch. 443, 448, n.

[9] *Waring* v. *Clark*, 5 How. 441; *The Genessee Chief*, 12 How. 457, *Jackson* v. *The Magnolia*, 20 How. 296; *The Eagle*, 8 Wall. 15.

diction of maritime seizures was superfluous. But that first Congress did not know it, and was taking no chances of judicial exclusion or limitation. The original language of Section 9 stands as proof of the intent of Congress as to meaning of the grant of jurisdiction, and the effect of the saving clause.

For a century and more, the language of the original Section 9, and the principle of *La Vengeance* has guided those charged with the administration of municipal laws so that invariably, in federal prosecutions, the jurisdiction has been laid in admiralty, and until this decision, we think no United States attorney or judge would have had any hesitation in saying: *This jurisdiction is exclusive.*[10] Furthermore, the principle has so far influenced state enforcement authorities that, except in a bare handful of cases in which this question was in no way considered, no proceedings *in rem* have been attempted. We submit that this settled state of affairs, and the almost universal acceptance of these old decisions should not be disturbed without the most serious and pressing reasons.

This Court has gone back to original sources to interpret the saving clause, overlooking the principle that these original sources, the English and Colonial jurisdictions, contained much which the builders of our constitutional government rejected, or fully intended to reclassify. In the last analysis, the admiralty jurisdiction of the United States is not English or Colonial but is our own. Its scope,

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[10] We refer, of course, to causes of *maritime* seizures. There can be no doubt that there is a most extensive and proper jurisdiction in state courts and on the law side of the federal courts, dealing with forfeitures based on *land* seizures. Of such were the cases of *The Sarah; 443 Cans of Egg Products* vs. *United States;* and *United States* v. *422 Casks of Wine,* all referred to at page 15 of the opinion. There can be no doubt that in land forfeitures, the exchequer proceeding *in rem* is allowable and very widely used.

its limitations and the qualifications of the saving clause, rest upon our own law and our own statutes. The adoption of the constitution and the construction of the federal judicial system, accomplished a political and judicial revolution, such as the world rarely sees. Pre-constitutional precedents represented conditions which in large part, the new system was designed to cure.

In *The Belfast*, 7 Wall. 624; 636, this Court said:

> "Best guide as to the extent of the admiralty jurisdiction of the federal courts, are the Constitution of the United States, the laws of Congress *and the decisions of this Court.*"

We respectfully urge that in the opinion at bar, the Court has disregarded those guides, and, in going back to English and Colonial jurisdictions, has based its decision upon the evils and not upon the cure of them. The principle of *La Vengeance* is sound, and should not be overruled.

POINT TWO.

The majority of the Court sees an exception in causes of seizure for forfeiture, to the generalization that a judgment *in rem* is not a common law remedy.[11] We have searched the cases in vain for any hint of such an exception, and cannot find it. It seems to us that what the Court calls a "generalization" is really the statement of a fundamental principle, and that the cases dealing with conventional maritime liens, are simply one application of it.

But is not the right to seize and have condemned for penalty or forfeiture, a maritime lien in all principle? The authorities seem to point that it is.

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[11] Opinion, p. 3.

Forfeitures are civil causes. They rest upon tort. And, whether the proceeding be according to the admiralty or exchequer practice, the theory is the establishment of a *jus in re*. The whole idea of an inanimate *reus* or defendant comes from the Roman law and is the foundation of the civil law procedure *in rem*. The common law played about with the concept in the early times, but it became lost in the shuffle, and the only survival of it was the common law distinction between actions real and actions personal.[12]

The *jus in re* as distinguished from the *jus ad rem*, is a present inchoate property right. A proceeding *in rem* makes it perfect. It can make no difference whether the right in the thing is a title to the whole or part of it, a right to possession or a right by way of security, arising from actual or constructive hypothecation of it.

The civil law; the continental admiralties, and the ancient English grants recognized the jurisdiction in admiralty to adjudicate by a proceeding *in rem* any *jus in re* with respect to a thing maritime, but, by force of common law and exchequer prohibitions, seizures for forfeitures and penalties and petitory suits were withdrawn from it. Some of the jurisdiction as to penalties and forfeitures was restored by statutes, but as to petitory rights, the English admiralty became impotent. It therefore became the habit to speak of rights in a thing maritime enforceable by proceedings *in rem*, as *maritime liens*, for, except for prize causes and certain causes of possession; marine hypothecations were about the only thing left to the jurisdiction *in rem* of the English admiralty.

The limitation of jurisdiction *in rem* to property rights based on hypothecations was not accepted in the United

[12] See the comprehensive note in *Jones' Blackstone*, Bk. III, pp. 1843-50.

States or by this Court.[13] Our jurisdiction in admiralty to try petitory suits *in rem* has been unquestioned. The right underlying such a jurisdiction and procedure is the *jus in re*, which, in petitory suits, is not a *lien* in the conventional sense, but a *title*.

The closest analogy we have in the law to causes of seizures for forfeitures and penalties, is causes of capture as prize of war. The latter rests on the sovereign belligerent right; the former on the sovereign municipal right. Both rights are the same civil law *jus in re* and are indistinguishable in principle. Yet no one would deny that the admiralty jurisdiction *in rem* over causes of capture in prize is exclusive.[14] A penalty lien for breach of municipal law is indistinguishable from a maritime tort lien; because of a wrong committed, a civil right in the thing arises in the outraged sovereign or in the victim of the tortious act. And a penalty is distingnishable from a forfeiture only in that it exacts a part and not necessarily the whole.

All these rights in the thing,—the right *jure belli* of the sovereign captor, the right of seizure for penalty or forfeiture, the lien or right of a contract lienholder or the lien or right of the victim of a tortious act, have a common source, the right in whole or in part to, the *reus*, itself. That admiralty has jurisdiction *in rem* of all these causes cannot be gainsaid.

The remedy *in rem* is nothing more than a general procedure and is competent to enforce *any* right in a thing.

We submit, there is no significance to be derived from the fact that the *Moses Taylor* case[15] and most of other

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[13] *Ward* v. *Peck*, 18 How. 287, wherein jurisdiction in admiralty of a petitory suit *in rem* to try title to a ship was affirmed by this court, on the authority of Justice Storey's decision on circuit in *The Tilton*, 5 Mason 465, Fed. Cas. No. 14054.

[14] See *Rose* v. *Himley*, 4 Cranch. 241, wherein no material distinction is noted between causes of capture and causes of seizure.

[15] 4 Wall 411.

which have established the doctrine of the exclusive character of the admiralty proceeding *in rem*, happen to deal with contract or tort liens. None of those cases ever suggested that the principle was limited to contract or tort liens asserted by private suitors, and most of them did not use the term "lien" at all. They state that the doctrine applied to *proceedings in rem*.[16]

Many other cases, applied the doctrine of the *Moses Taylor* in terms of "proceedings *in rem* to foreclose maritime liens." But, as we shall see, there is strong authority for holding that, essentially, a right of seizure for penalty or forfeiture, a right of prize, and a maritime title or right to possession may fairly be defined as maritime liens, and are so closely analogous thereto that the same principles of remedy must cover all of them.

In *The Rock Island Bridge*, 6 Wall 213; 215, Justice Field said that the only object of a proceeding *in rem* in admiralty is to make the right of a maritime lien available,—to carry it into effect; that it subserves no other purpose; the lien and the proceeding *in rem* are, therefore, correlative,—where one exists the other can be taken, and *not otherwise*. His authority was *The Bold Buccleugh*, 7 Moore, P. C. 284; which teaches that the proceeding *in rem* is "a process to make perfect a *right*, inchoate from the moment the lien attaches."

Now if these statements were meant to encompass *only* contract and tort hypothecations, they are patently inaccurate. It is obvious that even in England, rights of prize and rights of possession were enforceable by a proceeding

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[16] See *The Moses Taylor* and other cases referred to in the body of the dissenting opinion, p. 7.

[17] The cases in this Court are cited in the footnote on page 7 of the dissenting opinion.

in rem, in admiralty, and in the United States, causes of penalty, forfeiture, and title, as well as of prize and of possession are so enforceable. To make these statements of Justice Field, and of the Privy Counsel speak accurately, we must substitute for "maritime lien" the term "maritime right", or "privilege". And this Court has said, that the process *in rem* is founded on a *right* in a thing, and its object is to *obtain the thing* itself or satisfaction out of it for some claim resting upon a proprietary right."[18] Later this Court said that actions *in rem* were prosecuted "to perfect a maritime privilege or a lien".[19]

The statement that the object of a proceeding *in rem* is "to obtain the thing itself" fits a forfeiture, prize or petitory proceeding like a glove.

But regardless of the accident of choice of words, the *Moses Taylor* rule has been accepted for years as unqualifiedly inhibiting any proceeding *in rem* in a maritime cause except in a court of admiralty. We submit, the exception which the court now attaches to it, is not sound in principle.

We respectfully insist that the exchequer proceeding *in rem* never could have been in the contemplation of Congress as a common law remedy to be saved in admiralty causes. This is not only because of authority and the evident intention of Congress as put forward under our Point One, but by reason of its essential character.

There is no indication that the Court of Kings Bench or the Court of Common Pleas, ever administered a remedy *in rem* in any cause whatsoever, land or water. Lord Hale tells us, that the remedy was only available in the exchequer.[20] Granting that in the 18th century the exchequer

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[18] *The Maggie Hammond*, 9 Wall 435; 457.

[19] *The Sabine*, 11 Otto 384; 388.

[20] Treatise, *Hargraves Law Tracts*, Vol. 1, p. 226.

court would qualify as one of the great courts administering the common law,[21] it does not follow that any remedy it made available was necessarily a common law remedy. The exchequer was the only court of the three with a continental background. It was the ancient and sovereign court of Normandy with almost a universal jurisdiction.[22] To England it brought many of its continental practices, and many of them survived. No one can look at the exchequer remedy *in rem*, and the admiralty remedy *in rem* in parallel and detect any essential difference, except that the exchequer remedy carried the right of trial by jury, which it owes to the Magna Charta. Otherwise the two are as alike in process, machinery and result, as two eggs from the same hen. Their common civil law origin and attributes are too apparent for argument.

It is most significant, we think, that when the jurisdiction of the Court of Kings Bench was invoked to enforce a forefeiture, it was only able to give a *personal* action of detinue, with resort to the fiction that the bringing of the action was tantamount to a seizure.[23] We think that is as far toward the approximation of a remedy *in rem* that the common law could go. A common law remedy within the meaning of the saving clause would seem to be one which any common law court could administer upon a conventional common law writ and by conventional common law practice.

The jurisdiction of colonial and pre-constitutional state courts of common pleas and oyer and terminer afford hardly a fit standard for determining what Congress meant in the saving clause by "a common law remedy". Their jurisdiction was a complete hodge-podge of all sorts and

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[21] Opinion, p. 12.

[22] *Gilbert*, Treatise on the Court of Exchequer, Ch. 1.

[23] Opinion, p. 5; *Rogers* v. *Withered*, 5 Mod. 193; 12 Mod. 92.

kinds of causes, and the creation and growth of the vice admiralty courts added to a jurisdictional confusion and overlap which was found intolerable, and which the constitutional government was designed to clear away. The Court has observed that many of these so-called common law courts, exercised *admiralty jurisdiction*.

There are so many references in the opinion to various "courts which have exercised a jurisdiction *in rem*", that we venture to suggest that this Court has forgotten that the saving clause does not save the jurisdiction of common law courts, or save common law jurisdiction to state courts. It saves common law remedies to suitors, when the common law (not the courts) is competent to give it. We submit that it does not matter how many courts have been given by statute or have otherwise assumed to afford a remedy *in rem*. The question is,—is the remedy under examination *a common law remedy*?

That was the test unanimously laid down by this Court in *The Moses Taylor* when it said:

> "It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem*, as used in the admiralty courts is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."[24]

POINT THREE.

When the overruling or qualification of long established principles or practices is in contemplation, consequential considerations are most pertinent.

By opening an elective remedy in the non admiralty courts to suitors in causes of forfeiture with the right of

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[24] 4 Wall 411, 431.

trial by jury, the present decision seems certainly to overrule the principle of *La Vengeance*, of *The Betsey and Charlotte* and of the many other cases cited under our Point One. While the principle of the *Moses Taylor* is not directly overruled, the qualification placed upon it cannot but have the effect of weakening and discrediting the principle itself. Even if, by a series of subsequent decisions, this one may finally be rationalized with the *Vengeance* and *Moses Taylor* principles, there is bound to intervene a considerable period during which there will be grave judicial and administrative doubts both in the federal and state systems.[25]

We fully realize that the Court is only called upon to decide the precise question before it, and it is not our purpose to complain that the opinion does not settle all points and questions which might be raised. Our point is directed to the expediency of *creating* doubts and uncertainties, which, prior to the decision, did not exist.

Once it is postulated that the *Moses Taylor* principle does not encompass all proceedings *in rem* in admiralty causes, it ceases to be a principle resting on reason and logic. It becomes vulnerable to any device whereby a state or local legislature can evolve a proceeding *in rem* which colorably is not a maritime lien foreclosure. Any state may authorize a proceeding *in rem* in petitory and possessory causes, and claim with entire logic, that it is in essence the same remedy as that administered in the court of exchequer. Any state legislature or municipal body has full authority to revive the vicious *qui tam* action *in rem*, for penalties and forfeitures whereby in England and the American colonies, maritime commerce was harrassed by countless

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[25] The writer has already heard comments on the decision from disinterested members of the admiralty bar which seem fully to justify this statement.

suits by irresponsible professional informers.[26] And it is inevitable, we think, that the *Moses Taylor* rule will come under direct attack by the protagonists of non admiralty jurisdiction *in rem*, for once it is admitted that there *is* a concurrent common law remedy *in rem*, why should it not be available to all suitors, regardless of the nature of their right. After all a remedy *in rem* is but a procedure, and if it is available for one sort of maritime right, only the arbitrary fiat of a court can justify the withholding it as to other maritime rights. A principle cannot rest and endure on a destroyed foundation.

Federal administration will be thrown into doubt and uncertainty, for who can say without further instruction from this Court whether maritime seizures under United States laws are triable by jury at common law, or whether the rule of *La Vengeance* still stands as to federal causes. There will be further uncertainty as to whether the rule in this case applies only to seizures for forfeiture, or to seizures for penalty as well.

Prior to the decision herein, these ghosts were laid, and the remedial jurisdictions of admiralty and common law were at peace. The costs of raising them hardly seems justified by the benefits, if any, which this dead or moribund concurrent jurisdiction will accomplish.

We need not argue for the integrity of the admiralty jurisdiction, for this Court has always been its champion. The pronouncements of the Court have ever tended to

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[26] Judge Hough tells us that during the brief life of the New York State Court of Admiralty, (1784 to 1789), something less than one hundred suits were filed. Of these more than half were *qui tam* actions brought by one Lamb. His programme was evidently to compel settlements, for the cases were rarely if ever tried. *Hough, Cases in Admiralty and Vice Admiralty*, p. 253.

extend and solidify it. Backward steps have been rare, and have never endured. Many of the forward steps have been over sturdy and sincere dissents, but with one exception,[27] time and the needs of the expanding commerce of the United States have fully justified the majority. Because of this championship, the admiralty jurisdiction has become certain and static, and its administration by the federal courts has the trust and confidence of the maritime world. We submit that by impairing the integrity of the *Moses Taylor* principle, the present decision with all its implication takes a long backward step toward the confusion of pre-constitutional times.

Against these practical considerations there is little benefit to a state or to the public in ceding an important aspect of admiralty jurisdiction to the mercies of state judicial control. We are told in the majority opinion, that considerations of practical convenience in the conduct of forfeiture proceedings militate against our position, and against an assumption that the Judiciary Act struck down the large body of state legislation providing for forfeitures of boats and nets in state courts, now rooted in the legislation of twenty-three states.[28] We suggest that the *Moses Taylor* principle, applied to state causes for penalty or forfeiture, neither strikes down the legislation of the states nor seriously impedes its enforcement. It cannot be doubted that the principle in no way impairs the substantive laws of the

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[27] The exception is the doctrine of *Southern Pacific* v. *Jensen*, 244 U. S. 205, now definitely regarded as a "problem child". But in *Davis* v. *Department of Labor and Industries* (1942), 87 L. Ed. 175, although both the majority and the dissenting justices were dissatisfied with the Jensen doctrine, it was decided that the confusion which would result from overruling it, would be worse than the doctrine's continued existence.

[28] Opinion, pp. 12-13.

state, if otherwise valid, nor does it preclude enforcement thereof *in personam* in a state court or *in rem* in the federal district court in admiralty.[29] The only actual effect, upon the state legislation, of adherence in this case to the Moses Taylor principle would be that the state authorities, like the United States, or any other suitor with a cause *in rem*, would seek the adjudication thereof in admiralty. This seems to us no great hardship.

On the other hand, the wisdom of confining to the forums of admiralty, suits *in rem* against vessels, cargoes and the instruments of fishing and commerce is fully apparent. Every reason which would justify the confining of a private suitor to a court of admiralty fully applies to a state or local authority. These considerations are even more cogent when suits are brought pursuant to local laws, for these may raise substantive questions of federal import, such as whether they contravene an act of Congress or interfere with the uniformity of the substantive maritime law. Those matters, if litigated in a state forum, cannot be passed upon by the federal judiciary, unless and until, after a devious passage through the appellate courts of the state, this Court grants certiorari.

It is true that this particular case involves only a fish net[30] but as the dissenting Justice cogently points out, the principle here decided would apply to any regulation by a state or local authority, and might affect and halt the largest foreign vessel afloat. A town council might declare vessels to be forfeited for creating a smoke nuisance, and

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[29] State created liens and other substantive rights have always been enforced by the federal admiralty jurisdiction. The practice has the full sanction of this Court. *The Glide*, 167 U. S. 606; *The J. E. Rumbell*, 148 U. S. 1.

[30] A purse seine of this type represents substantial value. They cost, new, from $3,000 to $6,000, complete with corks, leads and lines.

the verdict of a local jury or the judgment of a local magistrate might condemn to forefeiture an ocean liner.[31]

The great balance of public interest and convenience will be far better served if all proceedings *in rem* against vessels and marine property are conducted in the admiralty courts before judges of experience in maritime affairs, free from the prejudices or whims of local juries or magistrates.[32] It was to protect maritime commerce from the direct and variously exercised control of local interests that the admiralty jurisdiction was given to the federal government. We do not think that state or local authorities will ever have occasion to complain that they cannot get full justice in the federal admiralty courts, and the public and the foreigners with whom our national trade is conducted will have continued assurance of a skilled and unprejudiced judge administering a uniform and time tested procedure.

The confirming of the exclusive admiralty jurisdiction *in rem* in causes of seizures for forfeiture will deprive the states of nothing which they could enjoy under the decision as it stands, except a jurisdiction in local courts, which if it

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[31] As a more practical illustration, we point to Sec. 1110 of the California Fish and Game Code, whereby if, without a permit from the Fish and Game Commission, a vessel brings into state *waters* fish or shellfish *wheresoever caught*, and not designed for delivery in a port of the *state*, the vessel is subject to forfeiture, to be accomplished by a proceeding according to Section 845 of the same code. The latter is the same section under which the Reliance's net was condemned. We express no opinion for or against the vulnerability of Sec. 1110 to attack on general federal grounds, but it is obvious that it might be construed and applied by a state court to accomplish an outrageous interference with commerce and navigation both as to domestic and foreign vessels.

[32] The commercial fisherman of the Port of Los Angeles complain that when arrests in county waters are made, the fish and game enforcement officers do not permit the prosecutions to be conducted in the courts of the large cities, but take the defendants before magistrates in small communities supported largely by the activities of sport fishermen.

legitimately exists, has been rarely exercised. The California statute under which these proceedings were had, has been in existence for over thirty years, but only a few prosecutions were ever had under it, and only this one reached an appellate court. The assertion of *in rem* jurisdiction in other states seems to have been almost as rare.[33]

Conclusion.

We earnestly submit that the determination of this important and far reaching question should rest on the sound and long established principles of jurisdiction, so often and so carefully considered and re-considered by this Court, and that the time has long since passed for injecting into the scheme of maritime remedies this mongrel remedy of the exchequer, which we know this Court examined and rejected over a century ago. We earnestly urge that the sound doctrine of *The Moses Taylor* be not qualified or weakened, by an exception which cannot materially benefit those whom it is designed to aid, but which may strike at the very heart of the beneficial jurisdiction of the admiralty and destroy one of its most valuable safeguards of the commerce of the world.

For the reasons herein stated the petitioners respectfully pray that the present judgment of the Court be vacated and that a rehearing of the cause be granted.

ALFRED T. CLUFF,
ARCH E. EKDALE,
Attorneys for Petitioners.

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[33] If, as was held in *The Elexena*, 53 Fed. 359, a state proceeding *in rem* cannot cut off maritime liens, the remedy is not even practical, for neither the state nor a purchaser at a judicial sale could ever be sure of an unimpaired title.

Certificate of Counsel.

I, ALFRED T. CLUFF, one of the attorneys for the petitioners, hereby certify that the foregoing petition for rehearing of the cause is presented in good faith and not for delay.

New York, N. Y., March 19, 1943.

ALFRED T. CLUFF,
Attorney for Petitioners.

P. 7 - dissent

SUPREME COURT OF THE UNITED STATES.

No. 60.—October Term, 1942.

C. J. Hendry Company and Frank Sematovich, Petitioners,
vs.
E. C. Moore, I. Zellerbach and A. T. Jergens, as the Fish and Game Commission of the State of California.

On Writ of Certiorari to the Supreme Court of the State of California.

[February 8, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The Fish and Game Commission of California, having seized a purse net while it was being used for fishing in the navigable waters of the state in violation of the State Fish and Game Code, brought the present proceeding under § 845 of the Code for forfeiture of the net. The question for decision is whether the state court's judgment, directing that the net be forfeited and ordering the commission to sell or destroy it, is a "common law remedy" which the "common law is competent to give" within the statutory exception to the exclusive jurisdiction in admiralty conferred on district courts of the United States by § 9 of the Judiciary Act of 1789, 1 Stat. 76-77, 28 U. S. C. §§ 41(3) and 371(Third).

Section 845 of the California Fish and Game Code declares that a net used in violation of the provisions of the Code is a public nuisance and makes it the duty of any arresting officer to seize the net and report its seizure to the commission. The statute requires the commission to institute proceedings in the state superior court for the forfeiture of the seized net and authorizes the court, after a hearing and determination that the net was used unlawfully, to make an order forfeiting it and directing that it be sold or destroyed by the commission.

In this case the commission seized the net while it was being used by the fishing vessel *Reliance* in navigable coastal waters of the state in violation of §§ 89 and 842, which prohibit fishing by net in the area in question, and respondents, the members of the

commission, brought this proceeding in the state superior court for the forfeiture of the net. Petitioners appeared as claimants and after a trial the court gave judgment that the net be forfeited, ordering respondents to sell or destroy it. The Supreme Court of California at first set the judgment aside, but after rehearing affirmed, 18 Cal. (2d) 835, holding that the remedy given by the judgment is a "common law remedy" which "the common law is competent to give", and that the case is not within the exclusive jurisdiction in admiralty conferred on the federal courts by the Judiciary Act and hence was properly tried in the state court. Cf. *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638; *The Hamilton*, 207 U. S. 398, 404; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 123. We granted certiorari, 316 U. S. 643, the question being of importance in defining the jurisdiction of state courts in relation to the admiralty jurisdiction.

Only a single issue is presented by the record and briefs—whether the state is precluded by the Constitution and laws of the United States from entertaining the present suit. It is not questioned that the state has authority to regulate fishing in its navigable waters, *Manchester* v. *Massachusetts*, 139 U. S. 240; *Lawton* v. *Steele*, 152 U. S. 133, 139; *Lee* v. *New Jersey*, 207 U. S. 67; *Skiriotes* v. *Florida*, 313 U. S. 69, 75; and it is not denied that seizure there of a net appurtenant to a fishing vessel is cognizable in admiralty. But petitioners insist that the present proceeding is not one which can be entertained by a state court since the judgment *in rem* for forfeiture of the net is not a common law remedy which the common law is competent to give, and that the case is therefore not within the statutory exception to the exclusive admiralty jurisdiction of the federal courts. In this posture of the case, and in the view we take, we find it necessary to consider only this contention.

Section 371 (Third) of 28 U. S. C., derived from § 9 of the Judiciary Act of 1789, confers exclusive jurisdiction on the federal courts "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it . . . ." A characteristic feature of the maritime law is its use of the procedure *in rem* derived from the civil law, by which a libellant may proceed against the vessel, naming her as a defendant and seeking a judgment subjecting the vessel, and hence the interests of all persons in her, to the satisfaction of the asserted claim.

Suits *in rem* against a vessel in cases of maritime tort and for the enforcement of maritime liens are familiar examples of a procedure by which a judgment *in rem* is sought, "good against all the world".

The question whether a maritime cause of action can be prosecuted in the state courts by such a procedure was first discussed by this Court seventy-seven years after the adoption of the Constitution and the Judiciary Act, in *The Moses Taylor*, 4 Wall. 411, which held that a lien upon a vessel, created by state statute, could not be enforced by a proceeding *in rem* in the state courts. Decision was rested on the ground that exclusive jurisdiction of the suit was vested in the federal courts by the Judiciary Act, since a judgment *in rem* to enforce a lien is not a remedy which the common law is competent to give, a ruling which has since been consistently followed. *The Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Glide*, 167 U. S. 606; *The Robert W. Parsons*, 191 U. S. 17, 36-38; *Rounds* v. *Cloverport Foundry*, 237 U. S. 303, 307-08. Eleven years earlier this Court in *Smith* v. *Maryland*, 18 How. 71, without discussion of the point now at issue, had sustained the seizure and forfeiture of a vessel in a state court proceeding *in rem*, all pursuant to state statutes, for violation of a Maryland fishing law within the navigable waters of the state. The Court declared that the statute, which prescribed the procedure *in rem* in the state court, conflicted "neither with the admiralty jurisdiction of any court of the United States conferred by Congress, nor with any law of Congress whatever" (p. 76). The authority of that decision has never been questioned by this Court.

The common law as it was received in the United States at the time of the adoption of the Constitution did not afford a remedy *in rem* in suits between private persons. Hence the adoption of the saving clause in the Judiciary Act, as this Court has held in the cases already cited, did not withdraw from the exclusive jurisdiction of admiralty that class of cases in which private suitors sought to enforce their claims by the seizure of a vessel in proceedings *in rem*. But to the generalization that a judgment *in rem* was not a common law remedy there is an important exception. Forfeiture to the Crown of the offending object, because it had been used in violation of law, by a procedure *in rem* was a practice familiar not only to the English admiralty courts but to the Court of Exchequer. The Exchequer gave such a remedy for the forfeiture of articles seized on land for the violation of law.

And, concurrently with the admiralty, it entertained true proceedings *in rem* for the forfeiture of vessels for violations on navigable waters.[1] Such suits in the Exchequer were begun on information and were against the vessel or article to be condemned. Under the provisions of many statutes the suit might be brought by an informer *qui tam*, who was permitted to share in the proceeds of the forfeited article; the judgment was of forfeiture and the forfeited article was ordered to be sold. This was the established procedure certainly as early as the latter part of the seventeenth century.[2] Proceedings *in rem*, closely paralleling those in the Exchequer, were also entertained by justices of the peace in many forfeiture cases arising under the customs laws (see Hoon, The Organization of the English Customs System, 1696-1786, pp. 277, 280-83), and the Act of 8 Geo. I, c. 18, § 16, placed within that jurisdiction the condemnation of vessels up to fifteen tons charged with smuggling.

While the English Acts of Navigation and Trade and numerous other forfeiture statutes conferred jurisdiction on all the English common law courts of record[3] to entertain suits for forfeiture,

[1] We are not concerned here with the question whether the admiralty jurisdiction was fully concurrent with that of the Exchequer even in the case of seizures on navigable waters. During the historic struggle between the admiralty and the common law courts the latter sought, with varying success, to restrict the admiralty jurisdiction to the high seas and to exclude it from harbors, estuaries, and other arms of the sea. See Justice Story's elaborate discussion in DeLovio v. Boit, 2 Gall. 398, especially at 425 *et seq.*; Waring v. Clarke, 5 How 441; Mears, The History of the Admiralty Jurisdiction, in 2 Select Essays in Anglo-American Legal History, p. 312, especially pp. 353 *et seq.*; Roscoe's Admiralty Practice (5th ed.), pp. 4-15; Marsden, Introduction, 2 Select Pleas in the Court of Admiralty (11 Selden Soc. Publ.); Marsden, Law and Custom of the Sea, vol. 2, pp. vii-xxii. Compare Hoon, The Organization of the English Customs System 1696-1786, p. 276.

[2] Blackstone, Commentaries, Bk. III, p. 262; Sir Geoffrey Gilbert, A Treatise on the Court of Exchequer (1758) pp. 180-91; "B. Y.", Modern Practice of the Court of Exchequer (1730) pp. 139-50; Hale, Treatise, printed in Hargrave's Law Tracts (1787), vol. 1, pp. 226-27. See also Harper, The English Navigation Laws, ch. 10; Hoon, The Organization of the English Customs System, 1696-1786, ch. 8.

For some 18th century cases in the Exchequer involving the condemnation of ships, see Idle qui tam v. Vanbeck, Bunb. 230; Attorney General v. Jackson, id. 236; Scott qui tam v. A'Chee, Park. 21; Mitchell qui tam v. Terup, id. 227; Attorney General v. LeMerchant, 1 Anstr. 52; Attorney General v. Appleby, 3 Anstr. 863. See also cases referred to in Masterson, Jurisdiction in Marginal Seas, pp. 42, 68-71; Reeves, Law of Shipping and Navigation (2d ed. 1807) pp. 197-208.

[3] Statutory provision for the forfeiture of nets or boats used in unlawful fishing may be found as early as 1285, Act of 13 Edw. I, c. 47. See also 1 Eliz. c. 17; 3 Jac. I, c. 12; 13 & 14 Car. II, c. 28; 15 Car. II, c. 16, § 1(5), (8); 1 Geo. I, c. 18. The Act of 15 Car. II, c. 16, § 1(8), provided for the forfeiture of seines or nets used in Newfoundland harbors, to be recovered "in

nevertheless suitors having ready access to the convenient procedure of exchequer or admiralty in *qui tam* actions seem to have had little occasion to resort to the King's Bench or Common Pleas. In the occasional reported forfeiture cases brought in King's Bench, the English reports give us little light on the procedure followed or the precise form of judgment entered. In one case, *Roberts* v. *Withered*, 5 Mod. 193, 12 Mod. 92, the court seems to have adapted the common law action of detinue to forfeiture cases by resort to the fiction that bringing the action was the equivalent of a seizure which vested the property in the Crown so that a suit in detinue or replevin *in personam* to gain possession would lie. See Stephen, Pleading (3rd Am. ed.) pp. 47, 52, 69, 74; Ames, Lectures on Legal History, pp. 64, 71. Cf. *Wilkins* v. *Despard*, 5 Term Rep. 112.

Separate courts exercising the jurisdiction of the Court of Exchequer were never established in the American Colonies. Instead, that jurisdiction was absorbed by the common law courts which entertained suits for the forfeiture of property under English or local statutes authorizing its condemnation. Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes. Like the Exchequer, in cases of seizure on navigable waters they exercised a jurisdiction concurrently with the courts of admiralty. But the vice-admiralty courts in the Colonies did not begin to function with any real continuity until about 1700 or shortly afterward. See Andrews, Vice-Admiralty Courts in the Colonies, in Records of the Vice-Admiralty Court of Rhode Island, 1617-1752 (ed. Towle, 1936), p. 1; Andrews, The Colonial Period of American History, vol. 4, ch. 8; Harper, The English Navigation Laws, ch. 15; Osgood, The American Colonies in the 18th Century, vol. 1, pp. 185-222, 299-303. By

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any of His Majesty's courts in Newfoundland, or in any court of record in England or Wales".

The Navigation Acts commonly provided that a forfeiture proceeding might be brought, in addition to others, "in any court of record", e.g., 12 Car. II, c. 18, §§1, 3, 6, 18, or "in any of his Majesty's Courts of Record at Westminster", 8 Geo. I, c. 18, § 23; 6 Geo. II, c. 13, § 4. Some Acts included as the place for such suits "any Court of Admiralty . . . or . . . any Court of Reco.d" in the American Colonies or Plantations. E.g., 6 Geo. II, c. 13, § 3; 4 Geo. III, c. 15, § 41. The important Act of 1696 (7 & 8 Wm. III, c. 22, § 2) provided that forfeitures of ships and goods might be enforced "in any of his Majesty's courts of record at Westminster, or in any court in his Majesty's plantations, where such offence shall be committed".

that time, the jurisdiction of common law courts to condemn ships and cargoes for violation of the Navigation Acts had been firmly established, apparently without question, and was regularly exercised throughout the colonies.[4] In general the suits were brought against the vessel or article to be condemned, were tried by jury, closely followed the procedure in Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for sale.

The rise of the vice-admiralty courts—prompted in part by the Crown's desire to have access to a forum not controlled by

[4] VIRGINIA: In the 1670s forfeitures under the Navigation Acts were declared by the Council. See Minutes of the Council and General Court of Colonial Virginia, 1622-1632 and 1670-1676 (ed. McIlwaine, 1924), pp. 212, 214, 216, 242-44, 445-46. But by the 1690s such cases were tried at common law in the General Court *before* a jury. Although the records of the General Court were destroyed by fire during the evacuation of Richmond in 1865, copies of some of its more important proceedings during the 1690s, contemporaneously transmitted to England, have been preserved, and are reprinted in Executive Journals of the Council of Colonial Virginia (ed. McIlwaine, 1925), vol. I. See the cases of *The Anne & Catherine*, pp. 173-75; *The William & Mary*, pp. 241-43; *The Content*, pp. 379-80; Cole *v.* Three Pipes of Brandy, pp. 204-05; *cf. The Grape*, pp. 233-34, 300; *The Catherine*, pp. 268-64; *The Society*, pp. 196-97, 219, 235-36, 252-53. See also the cases of *The Elezabeth* and *The Mary & Ellery*, in Edward Randolph, Including His Letters and Official Papers (ed. Toppan, 1899), vol. 5, p. 139; *The Crown*, condemned by a jury at a special court in 1687, 12 Va. Mag. of Hist. & Biog. 189. The Governor exercised a power to commission a special admiralty court in the case of a prize (*The St. Ignace*, Exec. J., vol. 1, pp. 366-67, 368-69), but apparently not for condemnation cases under the Acts of Navigation. An admiralty court, for Virginia and North Carolina, was established in 1698. Id., p. 379; Chitwood, Justice in Colonial Virginia, pp. 71-73.

MARYLAND: A commission for a special court of admiralty to try forfeiture cases under the Navigation Acts for a limited period of time is to be found as early as 1684, 17 Archives of Maryland 360-62, (*cf.* 20 id. 72, 75, 165), some admiralty jurisdiction having previously been exercised by the Provincial Court, 49 Archives xv, xxi-xxiii. But forfeiture cases were tried generally at courts of oyer and terminer, acting with a jury. See Andrews, Vice-Admiralty Courts in the Colonies, *supra*, p. 8, n. 2; 57 Archives lvii; Morriss, Colonial Trade of Maryland 1689-1715, pp. 121-22; case of *The John*, 1687, 8 Archives 9; *The Providence*, 1692, 13 id. 320, 327 (see also Edward Randolph, vol. 5, p. 139); *The Ann of New Castle*, 1692, 8 Archives 445-47; *The Margaret*, 1692, 8 id. 489-91, and again in 1694, 20 id. 42-43, 65, 142, 184. *The Ann of Maryland* was acquitted at a special court of oyer and terminer in 1694; she was tried before the Provincial Court later the same year and acquitted by the jury; the judgment was reversed on appeal in May 1695; upon a second trial in the Provincial Court on a new information the jury again acquitted her in August 1695, but the proceedings on the second appeal are incomplete. Proceedings of the Maryland Court of Appeals 1695-1729 (ed. Bond, 1933), pp. xlvii-xlviii, 7-12, 22-24, 647-53; 20 Archives 64, 128-30, 155, 181, 188, 243-44, 438-45, 461; Edward Randolph, vol. 5, p. 139. *The Anne Helena* was acquitted by a jury in the Provincial Court, 1694, 20 Archives 13-, 180-81, 383-85. See also the full report of Blackiston qui tam *v.* Carroll, 1692, in Proc. Md. Ct. of Ap., pp. 29-41, where the judgment upon a jury's verdict condemning some casks of beer in the court of oyer and terminer

the obstinate resistance of American juries—did not divest the colonial common law courts of their jurisdiction to proceed *in rem* in cases of forfeiture and condemnation. The trial records have

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(p. 34) was reversed on appeal (p. 40). Compare *The Charles*, 1696, 23 Archives 3.

MASSACHUSETTS: Like the New York Mayor's Court, the Massachusetts Court of Assistants was invested with admiralty jurisdiction and it was authorized to dispense with jury trial in such cases. See Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century, ch. 3; Noble, Admiralty Jurisdiction in Massachusetts, 8 Publ. Colonial Society of Mass., 150, 154-57; Davis History of the Judiciary of Massachusetts, p. 75; argument of counsel in Insurance Co. v. Dunham, 11 Wall. 1, 8-9. Forfeiture cases under the Navigation Acts were, however, regularly tried by that court before juries, apparently in the same manner as other common law cases. Records of the Court of Assistants of the Colony of the Massachusetts Bay, 1630-1692 (ed. Noble, 1901), vol. 1, pp. 149, 150, 160, 168, 169, 170-71, 175-77, 209-10, 219, 230-31, 342-44, 355-56; and especially pp. 219-20, 349, 366, four cases—*The Swallow*, *The Newbery*, *The Two Brothers*, and *The Mary*—of trials de novo before a jury on appeal from the county court, which is not known to have been invested with any admiralty jurisdiction. The Privy Council upheld an appeal in the case of *The Two Brothers*, ordering the ship forfeited, but affirmed the judgment of the Court of Assistants releasing *The Mary*, 2 Acts of the Privy Council, Colonial, No. 480. See Edward Randolph, vols. 1-7; passim; Crump, *supra*, 140-44.

NEW JERSEY: Full records of several condemnation proceedings will be found in Journal of the Courts of Common Right and Chancery of East New Jersey, 1683-1702 (ed. Edsall, 1937). See Introduction, pp. 133-37; *The Thomas and Benjamin*, condemned on confession of judgment, 1685, pp. 192-94; *The Dolphin*, acquitted by a jury, 1685, pp. 198-200, and 138; Goodman qui tam v. Dounham, and Goodman qui tam v. Powel, calicoes condemned in default of a claimant, 1699, p. 319. See also the reference at pp. 136-37 to the condemnation of *The Unity* in 1688 in the Middlesex court of common pleas.

PENNSYLVANIA: In the closing years of the 17th century, admiralty jurisdiction in Pennsylvania was vested in the Provincial Council. Loyd, Early Courts of Pennsylvania, p. 68; Eastman, Courts and Lawyers of Pennsylvania, vol. 1, p. 165; Lewis, The Courts of Pennsylvania in the Seventeenth Century, 1 Rep. Pa. Bar Ass'n 353, 383, 389. Forfeiture cases under the Navigation Acts were nevertheless tried in the common law courts. See the case of *The Dolphin*, cleared by a jury at a special court in the County of Chester, 1695, Edward Randolph, vol. 5, pp. 108-14, 139; *The Pennsylvania Merchant*, condemned by a jury in the court of common pleas at Chester, 1695, Record of the Courts of Chester County, 1681-1697 (1910) pp. 366-69. Cf. Root, The Relations of Pennsylvania with the British Government, 1696-1765, pp. 108-11.

NEW HAMPSHIRE: *The George*, condemned by a jury at a special court in 1682. Calendar of State Papers, Colonial, America and West Indies, 1681-1685, Nos. 868-70; Edward Randolph, vol. 3, pp. 256-58. *The Hopewell* was acquitted by a jury in the court of common pleas in 1699; the cargo of *The Speedwell* was condemned by a jury in the same court in 1701, but the superior court reversed the judgment. See Andrews, Vice-Admiralty Courts in the Colonies, *supra*, pp. 10, n. 3, 49-50, and *cf.* p. 11, n. 1; Andrews, The Colonial Period of American History, vol. 4, p. 123; Aldrich, Admiralty Jurisdiction of New Hampshire, 3 Proc. N. H. Bar Ass'n (N. S.) 31, 50-51. See also *The Industry*, cleared by a jury in 1679. Edward Randolph, vol. 3, pp. 84, 343.

CONNECTICUT: The cargo of *The Adventure* was condemned by a jury in the county court at Hartford, 1692. See 3 Coll. of the Conn. Hist. Soc., pp. 264-66 n.

not yet been made available for all the Colonies, and in some instances perhaps can never be. But there is no reason to suppose that in this respect the judicial history of forfeiture proceedings in New York, manuscript records of which we have examined, is not typical of the others, and there is ample support for the conclusion that in the seaboard states forfeiture proceedings *in rem*, extending to seizures on navigable waters of the state, were an established procedure of the common law courts before the Revolution. It was the admiralty courts, not the common law courts, which had difficulty in establishing their jurisdiction, although in 1759 the Board of Trade was able to write that "With regard to breaches of the Law of Trade they are cognizable either in the courts of common law in the plantations, or in the courts of Admiralty, which have in such cases, if not in all, a concurrent jurisdiction with the courts of common law" (quoted in Andrews, Vice-Admiralty Courts in the Colonies, *supra*, at p. 7); and Stokes reported that the same situation prevailed at the outbreak of the Revolution. See Stokes, A View of the Constitution of the British Colonies (1783), pp. 270, 357 *et seq.*

In New York, admiralty jurisdiction was vested in the Mayor's Court in 1678, and that court continued to exercise jurisdiction in all maritime cases, including those arising under the Navigation Acts, throughout the colonial period even after the establishment of a court of vice-admiralty. See Select Cases of the Mayor's Court of New York City, 1674-1784 (ed. Morris, 1935) pp. 39-40, 566 *et seq.* But cases of forfeiture were also regularly prosecuted before the common law courts of the colony—in the General Quarter Sessions of the Peace in New York City during the 1680s,[8] and after the reorganization of the judiciary in 1691, in

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MAINE: See case of *The Gift of God*, cleared by jury, 1680 (court not specified). Edward Randolph, vol. 3, pp. 85, 348. This ship was tried again in 1683. Id., pp. 350, 351.

[8] See Larkin qui tam v. Sloop *Lewis*, condemned upon a confession of judgment, August 4, 1685 (Mss. in Hall of Records, N. Y. C., Pleadings K 450 and K 452), and compare Documentary History of New York (ed. O'Callaghan, 1850), vol. I, p. 116; Ludgar qui tam v. Sloop *Fortune*, May 5, 1685, condemned on confession of judgment (Ms. Minutes N. Y. C. Quarter Sessions 1683/4-1693/4, fol. 40); Meine qui tam v. Sloop *Unity*, August 3, 1686, condemned on confession of judgment (id., fol. 93); Santen qui tam v. *The Two Sisters*, August 2, 1686, acquitted by the jury (id., fol. 95). See also Ludgar qui tam v. Pinke *Charles*, August 4, 1685, acquitted by the jury of violating an act of the provincial assembly (id. fol. 48-50).

There is some record of courts of admiralty in New York before 1700, apparently acting under special commissions. Doc. Hist. N. Y., vol. 1, p. 60, vol. 2, pp. 164-68, 172, 176-77; Crump, Colonial Admiralty Jurisdiction in the Seventeenth Century, pp. 122-24.

the Supreme Court of Judicature,[6] which was given jurisdiction "of all pleas, Civill Criminall, and Mixt, as fully & amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have", 1 Colonial Laws of New York (1894) p. 229.

The Navigation Acts did not constitute the only authority for forfeiture proceedings in the common law courts. New York's own colonial legislation shows frequent use of the forfeiture sanction, applied sometimes to vessels as well as to commodities, as a means of enforcement of provincial laws fixing customs duties, regulating or prohibiting the exportation or importation of commodities, or requiring a specified manner of marking, storing or selling.[7] A common provision in these statutes was that the forfeitures imposed might be prosecuted in any court of record in the colony.

The records of the New York Supreme Court of Judicature contain numerous instances of forfeiture proceedings during the eighteenth century. One is *Hammond qui tam* v. *Sloop Carolina*,[8]

[6] The published Minutes of the Supreme Court of Judicature 1693-1701, 45 N. Y. Hist. Soc. Coll., disclose at least nine such cases during that period: Brooke v. Barquenteen *Roberts* p. 55; Brooke qui tam v. Barquenteen *Orange* and Jacobs, pp. 59, 61, 62, 63, 65, 68, 73 (and see the more complete accounts of this case in Harper, The English Navigation Laws, p. 193, and in Cal. St. Pap., Col., Am. & W. I. 1693-1696, Nos. 1133, 1546, 1891 and 2033); Brooke qui tam v. Iron Bars, pp. 59, 63; Hungerford v. Briganteen *Swift*, pp. 154, 156, 158; R. v. *The Concord* and Blake, pp. 156, 160, 162; R. v. Pipe Staves, pp. 157, 158; Hungerford v. East Indian Goods, pp. 166, 176; Hungerford qui tam v. Sundry Goods, p. 168 (see the information in N. Y. Misc. Mss. Box 3, N. Y. Hist. Soc.); Lott qui tam v. Sundry Goods and Allison, pp. 168, 173, 176, 183, 184. See also a confession of judgment, October 8, 1698, on an information filed in the court in Cortlandt qui tam v. *The Fortune*, Hall of Records, N. Y. C., Parchment 210 G-1.

[7] See Colonial Laws of New York 1664-1775 (1894): Vol. 1, pp. 252, 291, 292, 422-23, 451, 787, 850-51, 1017, 1022. Vol. 2, pp. 20, 21, 26, 27, 28, 33, 258, 260, 284, 287, 357, 358, 424, 435, 436, 477-79, 655, 778, 800, 853, 878-79, 909-10, 962, 1055. Vol. 3, pp. 33, 79, 95, 99, 108, 113, 115, 119, 245, 250-51, 356, 361-62, 442, 569, 790-91, 949-50, 972, 975. Vol. 4, pp. 107, 366, 1092. Vol. 5, pp. 316, 364-65, 547, 836, 857-58.

[8] Hall of Records, N. Y. C., Parchments 159 D 2 (judgment roll); Ms. Minutes Sup. Ct. of Jud. 1732-1737, Vol. 172-75.

In 1739 the Supreme Court of Judicature issued a writ of prohibition restraining prosecution of a forfeiture proceeding under 15 Car. II, c. 7, against *The Mary and Margaret* in the court of vice-admiralty. Four years later the Privy Council upheld the issuance of the writ, apparently accepting the view that a seizure in any part of New York harbor which was "within the body of the county" rather than on the high seas came within the exclusive jurisdiction of the common law courts—a ruling which probably left to the vice-admiralty court but a small role in cases under the Navigation Acts, except when the par-

a prosecution in 1735 for a false customs certificate, which resulted in the discharge of the ship and her cargo for failure of proof. Later cases show more in detail how closely that court's procedure in forfeiture cases followed the essentials of the procedure *in rem*, which had been developed in the English Exchequer.[9] Nor did the creation of a state Court of Admiralty after the Revolution effect a withdrawal of such jurisdiction from the common law courts. Statutes enacted in New York during the period of the Confederation, like the English and local legislation which preceded them, continued to employ forfeiture as a sanction,[10] and forfeiture proceedings continued to be brought in the Supreme Court and other common law tribunals.[11] The Act of April 11, 1787, 2 Laws of New York 509, 517, imposing import duties, provided that "all ships and vessels goods and merchandize which shall become forfeited by virtue of this act, shall be prosecuted by the

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ticular Act contained an express grant of such jurisdiction (cf. Note 3. *supra*). See Reports of Cases in the Vice-Admiralty and Admiralty of New York 1715-1788 (ed. Hough, 1925) p. 16; Documents Relative to the Colonial History of New York (1855), vol. 6, pp. 154-55; 3 Acts of the Privy Council, Colonial, No. 538. See also Root, The Relations of Pennsylvania with the British Government 1696-1765, p. 117, n. 100; Washburne, Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684-1776, p. 168. Compare later cases in Hough's Reports, in which the vice-admiralty court took a similar narrow view of its jurisdiction,—Kennedy qui tam v. 32 Barrels of Gunpowder (1754) p. 82; Spencer qui tam v. Richardson (1760) p. 181. See Note 1, *supra*.

[9] The following are all cases of judgments taken by default: Harison qui tam v. Several Parcels of Tobacco, Ms. Minutes Sup. Ct. of Jud., Engrossed, 1750-54, pp. 124, 127, 130 (April 23-25, 1752): Kennedy qui tam v. 77 Cases of Bottles, etc., id. 1754-57, pp. 254, 260 (April 29, 1756); Allen qui tam v. Two Tons etc. of Sugar, id. 1766-69, pp. 607-08 (January 21, 1769); Elliott & Moore qui tam v. Seven Casks of Tea, Hall of Records, N. Y. C., Pleadings K 474 (information), Parchments 120 G 1 (judgment roll) (August 1772); Elliott & Moore qui tam v. Nineteen Casks of Tea, etc., id., Parchments 29 F 9 (August 1772); Elliott & Moore qui tam v. Twenty Pipes of Wine, id., Parchments 93 H 2 (August 1772).

[10] See Laws of New York, 1777-1801 (1886), Vol. 1, pp. 19 112, 601 and 604, 627-28, 666-67. Vol. 2, pp. 516-17, 786, 789, 806-07. Similar legislation shortly after the adoption of the Constitution will be found in Vol. 4, p. 592; Vol. 5, p. 468.

Much of the colonial and state customs legislation before 1789 is collected in Hill, The First Stages of the Tariff Policy of the United States, 8 Publ. American Economic Ass'n, 453; Kelley, Tariff Acts under the Confederation, 2 Quarterly J. of Economics, 473; Ripley, The Financial History of Virginia 1609-1776, ch. 3.

[11] For example, see Lamb qui tam v. Sylsbee, information to condemn three thousand gallons of rum for violation of the Act of March 22, 1784 (filed September 14, 1785). Hall of Records, N. Y. C., Parchments P 9 B 1 (issue roll). The proceedings are incomplete, but a subsequent entry, October 27, 1785, indicates that the jury brought in a verdict for the plaintiff. Ms. Minutes Sup. Ct. of Jud., Jan. 1785-Nov. 1785, fol. 52.

collector, or officer or other person who shall seize the same, by information in the court of admiralty,[12] or in the court of exchequer,[13] or in any mayors court or court of common pleas in this State, in order to condemnation thereof". There was provision for proclamations to be made "in the accustomed manner", with detailed specification of the methods of making an appraisal and proceeding to judgment, and a further provision (p. 518) leaving it to the discretion of the collector of the port of New York or the attorney general "to direct in which of the courts aforesaid any information shall be brought touching such forfeiture".

In Pennsylvania we have a record of a similar exercise of jurisdiction in 1787 by the Philadelphia Court of Common Pleas in *Phile qui tam* v. *The Ship Anna*, 1 Dall. 197, where the jury condemned the ship.[14]

Examination of the legislative history of the Judiciary Act of 1789 does not disclose precisely what its framers had in mind when in § 9 they used the phrase "common law remedy". But it is unlikely that, in selecting this phrase as the means of marking

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[12] During the Confederation, courts of admiralty existed in each state and appeals in prize cases were taken to the Committee of Appeals in the Continental Congress, and after 1780 to the Court of Appeals. See 131 U. S., Appendix, pp. xix-xlix; Jameson, The Predecessor of the Supreme Court, in Essays in the Constitutional History of the United States in the Formative Period, p. 1; Wiener, Notes on the Rhode Island Admiralty, 1727-1790, 46 Harv. L. Rev. 44, 59. The New York Court of Admiralty was established in 1776 (see Hough's Reports p. xxiv), and its jurisdiction was restricted by the Act of February 14, 1787 (2 Laws of New York p. 394).

[13] The Court of Exchequer was created by the Act of February 9, 1786 (2 Laws of New York, p. 185), to entertain only prosecutions instituted by its clerk or by the state attorney general. It was presided over by the junior justice of the Supreme Court of Judicature, who was authorized to transfer "all cases of difficulty" to the Supreme Court of Judicature.

[14] *The Fame* was condemned in the Supreme Court of Pennsylvania in 1726. Osgood, The American Colonies in the 18th Century, vol. 2, p. 541; Root, The Relations of Pennsylvania with the British Government 1696-1765, p. 169; Pennsylvania Statutes at Large, 1682-1801 (1897 ed.), vol. 4, p. 422-26, 429-31; 6 Acts of the Privy Council, Colonial, Nos. 328, 333. For the case of *The Sarah*, acquitted at the New Castle Court of Common Pleas in 1727, see Root, p. 126; Board of Trade Papers, Proprietics 1697-1776, vol. XII, R: 119, 122 and 131 [copy in possession of the Historical Society of Pennsylvania]. See also *The Richard & William*, acquitted in the Philadelphia Court of Common Pleas, 1728, id., R: 93; *The Hope*, apparently acquitted by the jury in the Philadelphia Court of Common Pleas, the collector's appeal to the Privy Council being dismissed in 1737, 3 Acts of the Privy Council, Colonial, No. 381.

A number of cases tried in the common law court in Jamaica during the Revolutionary period are reported in Grant, Notes of Cases Adjudged in Jamaica, 1774 to 1787 [one of the few known copies of this work is in the Gerry Collection of the library of this Court]. See Rex qui tam v. Schooner *Revenge*, p. 116; Rex v. Sloop *Tryal*, p. 155; Woolfrys qui tam v. Ship *Tartar*,

the boundary of the jurisdiction of state courts over matters which might otherwise be within the exclusive jurisdiction of admiralty, the draftsmen of § 9 intended to withdraw from the state courts a jurisdiction and remedy in forfeiture cases which had been so generally applied by non-admiralty courts both in England and America, and which had become a recognized part of the common law system as developed in England and received in this country long before the American Revolution. Nor can we accept the suggestion that Congress, in this use of the phrase "common law remedy", was harking back some hundreds of years to a period before the Exchequer had taken its place as one of the three great courts administering the common law, and was likewise disregarding the experience of the common law courts in America with which it was familiar—all without any indication of such a purpose. Considerations of practical convenience in the conduct of forfeiture proceedings for violations of local statutes occurring on state waters, as well as the contemporary and later history of the exercise of the admiralty jurisdiction, indicate that there was no purpose to limit such proceedings to the exclusive jurisdiction of the admiralty.

Shortly after the adoption of the Constitution, state legislation was enacted regulating state tidal waters and authorizing forfeiture in the state courts of fish nets and vessels illegally used in fishing there. Such a statute was considered in 1823 in *Corfield* v. *Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3230, (cited in *Smith* v. *Maryland*, *supra*, 18 How. at 75), where a New Jersey state court forfeiture of a vessel under a statute regulating the Delaware Bay was upheld as constitutional by Justice Washington, without question of the state court's jurisdiction because of the *in rem* nature of the proceeding. No suggestion is to be found in that case or elsewhere that the Judiciary Act struck down the large body of state legislation, enacted shortly after 1789, which provided for the forfeiture in state courts of vessels or nets seized in navigable waters of a state for violating state fishing

pp. 156, 163; Macfarquhar qui tam v. Sloop *Flying Fish*, pp. 156, 188; Flowerdew qui tam v. Sloop *La Depeche*, p. 258; Macallister qui tam v. *The Greyhound*, p. 310; see also Ex parte Oliveres Daniel, p. 293. Compare Andrews, The Colonial Period of American History, vol. 4, p. 249, n. 3. See also cases of *The Dolphin* and *The Mercury*, condemned in the Jamaica Supreme Court of Judicature, 1742, judgments reversed and new trials ordered by the Privy Council, 1743, 3 Acts of the Privy Council, Colonial, Nos. 566-67; *The Lawrence*, condemned by the Jamaica Superior Court, 1769, reversed by the Privy Council, 1777, 5 id. No. 217.

laws.[15] And such legislation has become rooted in the law enforcement programs of about half the states,[16] without intimation from this or any other court that the Judiciary Act prohibited it. See *Boggs v. Commonwealth*, 76 Va. 989, 993-96; *Dize* v. *Lloyd*, 36 Fed. 651, 652-53; *Johnson* v. *Loper*, 46 N. J. L. 321; *Bradford* v. *DeLuca*, 90 N. J. L. 434; *Doolan* v. *The Greyhound*, 79 Conn. 697; *Ely* v. *Bugbee*, 90 Conn. 584; *State* v. *Umaki*, 103 Wash 232; *State* v. *Mavrikas*, 148 Wash. 651; *Osborn* v. *Charlevoix*, 114 Mich. 655, 663-66.

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[15] *The Hiram*, subject of the litigation in Corfield v. Coryell (and in Kean v. Rice, 12 Searg. & Rawl. 203), had been condemned under §§ 6 and 7 of the New Jersey Act of June 9, 1820, whose forfeiture provisions were derived from §§ 5 and 6 of the Act of January 26, 1798 (Paterson, New Jersey Laws 1703-1799, p. 263), in turn derived from §§ 2-6 of a Provincial Act of 1719, 5 Geo. I, c. 30 (Nevill, New Jersey Acts 1703-1752, pp. 86-88). Compare the forfeiture provisions of the Delaware River fishing legislation, in New Jersey Acts of November 26, 1808, § 4, and November 28, 1822, § 13, and in Pennsylvania Acts of February 8, 1804, § 5, of February 23, 1809, and January 29, 1823; see State v. Shoemaker, 20 N. J. L. 153 (1843).

Massachusetts enacted early legislation restricting fishing in navigable waters, including Taunton Great River and the Merrimack, and providing that any nets used unlawfully should be forfeited. Act of February 22, 1790 (forfeiture to be in a "trial in law"); Act of March 4, 1790, (forfeiture proceeding to be conducted in specified manner by justice of the peace); Act of March 27, 1793.

Delaware regulated the taking of oysters and other shellfish by the Act of February 12, 1812 (see Revised Laws, 1829, p. 274), imposed as a penalty the forfeiture of vessels and their equipment, and by § 2 provided that the condemnation proceeding should be before two justices of the peace in an action qui tam.

Rhode Island provided that, in the case of unlawful taking of oysters in any waters in the state, the vessel together with all its implements should be forfeited in an action qui tam in the court of common pleas or general sessions of the peace. See the 1798 revision of Public Laws, pp. 488-89, derived from an Act of August 1773 (R. I. Acts and Resolves, August 1773, pp. 63-64). Compare an Act of 1803, appearing in the 1822 revision of Public Laws, p. 516; an Act of 1802, § 1, in R. I. Public Laws 1798-1813 (Newport, printed by H. & O. Farnsworth) p. 83; Act of June 23, 1810, § 1, id., p. 194.

The 1808 compilation of the Statute Laws of Connecticut, Book I, Title LXX, Fisheries, contains several statutes passed between 1783 and 1798, regulating fishing on certain rivers, including the Connecticut, and punishing violations by both fine and a forfeiture of the seines or other implements used. See c. I, §§ 7, 10, 13; c. IV, § 1; Boles v. Lynde, 1 Root 395 (1790).

See also Trueman v. 403 Quarter Casks etc. of Gunpowder, Thacher's Cr. Cas., p. 14 (Boston, 1823).

[16] In addition to California, there are at least twenty-two states whose laws now make provision for the condemnation, in state court proceedings, of nets or vessels used in state waters, including navigable waters, in violation of state fishing laws. Arkansas, Pope's Digest, 1942 Suppl., § 5958; Connecticut Gen. Stat. 1930, § 3175; Delaware Rev. Code 1935, §§ 2904-2905, 2955, 2957-2958, 2990, 2991, 2993-2995, 2997, 3000-3002, 3004, 3007, 3015, 3024, 3030, 3035, 3037; Florida Stat. 1941, §§ 372.31, 374.41; Illinois Rev. Stat. 1941, ch. 56, § 109; Iowa Code 1939, §§ 1794.099-1794.102; Kentucky Rev. Stat. 1942, § 150.120; Louisiana Gen. Stat., Dart 1939, §§ 3074, 3108, 3118; Maine Rev. Stat. 1930, ch. 50, §§ 50, 81; Maryland Ann. Code, Flack

It is noteworthy that Blackstone's Commentaries, more read in America before the Revolution than any other law book, referred to the information *in rem* in the Court of Exchequer as the procedure by which forfeitures were inflicted for violation of Acts of Parliament. Bk. III, p. 262. And Kent, in his Commentaries, pointed out that "seizures, in England, for violation of the laws of revenue, trade or navigation, were tried by a jury in the Court of Exchequer, according to the course of the common law; and though a proceeding be *in rem*, it is not necessarily a proceeding or cause in the admiralty" (12th ed., Vol. 1, p. 374). He declared that, within the meaning of § 9 of the Judiciary Act, the common law was competent to give such a remedy "because, under the vigorous system of the English law, such prosecutions *in rem* are in the Exchequer, according to the course of the common law" (p. 376).

Upon the adoption of the Constitution the national government took over the regulation of trade, navigation and customs duties which had been prolific sources of forfeiture proceedings in the state courts. This Court in suits brought in admiralty sustained the admiralty jurisdiction over forfeitures prescribed by Congress for the violation of federal revenue and other laws where the seizure had occurred on navigable waters. *United States* v. *La Vengeance*, 3 Dall. 297; *United States* v. *Schooner Sally*, 2 Cranch 406; *United States* v. *Schooner Betsy*, 4 Cranch 443; *Whelan* v. *United States*, 7 Cranch 112; *The Samuel*, 1 Wheat. 9. Those decisions held that when the seizure occurred on navigable waters the cause was maritime and hence triable without a jury in the federal courts.[17] But they obviously did not determine, and there was no occasion to determine, whether forfeiture proceedings belonged in the category of maritime causes that might also be tried in state courts

1939, art. 39, §§ 10-12, 25, 65, 66, 67, 69, 72, 73; Massachusetts Gen. Laws 1932, ch. 130, § 74; Michigan Stat. Ann., Henderson 1937, §§ 13.1221-13.1225; Minnesota Stat. 1941, § 102.06(21); Mississippi Code Ann. 1930, § 6908; New Jersey Rev. Stat. 1937, Title 23, ch. 9, §§ 9-11, 14, 15, 20, 27-29, 32, 33, 44-46, 48, 49, 55, 63, 67, 110, 112, ch. 10, § 21; North Carolina Code 1939, § 1965(a); Ohio Gen. Code Ann., Page 1937, §§ 1416, 1450 (see 1942 Supp.), 1451; Oreg. Comp. Laws Ann. 1940, §§ 82-347, 83-318, 83-415, 83-520, 83-523; South Dakota Code 1939, § 25.0422; Virginia Code 1942, §§ 3159, 3169 (and see ch. 131), 3171, 3176, 3180, 3182, 3188, 3206, 3214, 3248, 3305, 3305b, 3305c; Washington Rev. Stat. Ann., Remington 1932, §§ 5692, 5671-1 (1940 Supp.); Wisconsin Stat. 1941, § 29.05(7).

[17] Section 9 of the Judiciary Act of 1789, 1 Stat. 77, provided that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury".

because, within the meaning of the saving clause, the common law was competent to give the remedy.

The Court has never held or said that the admiralty jurisdiction in a forfeiture case is exclusive, and it has repeatedly declared that, in cases of forfeiture of articles seized on land for violation of federal statutes, the district courts proceed as courts of common law according to the course of the Exchequer on informations *in rem* with trial by jury. *The Sarah*, 8 Wheat. 391, 396, n. A; *443 Cans of Egg Product* v. *United States*, 226 U. S. 172, and cases cited. In *United States* v. *422 Casks of Wine*, 1 Pet. 547, Justice Story defined such an action as a libel or information *in rem* on the Exchequer side of the court. And see Chief Justice Marshall's reference, in *Schooner Hoppet* v. *United States*, 7 Cranch 389, 393, to "proceedings in Courts of common law, either against the person or the thing for penalties or forfeitures". In all this we perceive a common understanding of judges, lawyers and text writers, both before and after the adoption of the Constitution, of the common law nature of the procedure and judgment *in rem* in forfeiture cases and of its use in such proceedings in the Exchequer and in the American common law courts.

We conclude that the common law as received in this country at the time of the adoption of the Constitution gave a remedy *in rem* in cases of forfeiture, and that it is a "common law remedy" and one which "the common law is competent to give" within the meaning of § 9 of the Judiciary Act of 1789. By that Act the states were left free to provide such a remedy in forfeiture cases where the articles are seized upon navigable waters of the state for violation of state law. It follows that *Smith* v. *Maryland*, *supra*, was rightly decided and is not in conflict with *The Moses Taylor*, *supra*, and cases following it, and that the judgment of the Supreme Court of California should be

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No 60—October Term, 1942.

C. J. Hendry Company and Frank Sematovich, Petitioners,
vs.
E. C. Moore, I. Zellerbach, and A. T. Jergens, as the Fish and Game Commission of the State of California.

On Writ of Certiorari to the Supreme Court of the State of California.

[February 8, 1943.]

Mr. Justice Black, dissenting.

If this case involved only a fishnet, I should be inclined to acquiesce in the holding of the Court. Indeed, we have held that a state may seize and condemn a fishnet of trifling value without following the formal procedure of court action at all. *Lawton* v. *Steele*, 152 U. S. 133. But the principle laid down here involves far more than a fishnet, for under it state courts are authorized through *in rem* proceedings to seize and condemn, for violation of local law, any equipment or vessel employed in maritime activity. Today's *in rem* action is against a fishnet used in patently illegal fashion; tomorrow's may be an action against a tramp-steamer or ocean liner which violates a harbor regulation or otherwise offends against the police regulations of a state or municipality. Persons guilty of violating state laws affecting maritime activity may be prosecuted by *in personam* actions in state courts,[1] and the admiralty courts themselves can helpfully enforce state laws through *in rem* proceedings.[2] I do not believe, however, that the Judiciary Act permits states, through state common law courts which cannot reasonably be expected to have knowledge of admiralty law and practice, to give permanent halt to any portion of the maritime

[1] For a fact situation analogous to the instant case in which the state protected its fishing grounds through an *in personam* action, see Manchester v. Massachusetts, 139 U. S. 240. See also, as cases concerning the state criminal jurisdiction in the maritime field, United States v. Bevans, 3 Wheat. 336, and Wildenhus' case, 120 U. S. 1.

[2] See, e. g., as cases on liens in wrongful death actions, The J. E. Rumbell, 148 U. S. 1, and The Hamilton, 207 U. S. 398.

trade and commerce of the nation by bringing *in rem* proceedings against ships.[3]

The issue as put by the Court is this: The Judiciary Act of 1789 places in the federal admiralty courts exclusive jurisdiction over admiralty cases except where the common law provides an equivalent remedy. It is conceded that as a general proposition the common law courts have no *in rem* remedy in maritime cases. However, the Court holds squarely, for the first time in its history, that there is an exception to this rule which permits states to bring *in rem* forfeiture proceedings in common law courts. The Court brushes aside as mere generalizations the many cases hereafter considered which declare that *no* equivalent of an admiralty *in rem* proceeding may be brought at common law. Today's holding is rested principally on the English and colonial practice prior to 1789 and on one case in this Court. I disagree, believing that the English practice is irrelevant, that the colonial law was not in accord with the English practice, and that a long series of cases since 1789 have clearly considered the proposition put by the Court, and have given the Judiciary Act a meaning squarely opposite to that now announced.

The English Exchequer practice on which the Court appears to rely so heavily seems to me to be irrelevant because it was not in conformity with our own early American development. The colonists, of course, did not establish admiralty courts the moment they stepped from the vessels which brought them to the New World, and for a substantial portion of the seventeenth century maritime forfeitures were collected in the fashion of the English courts. However, toward the end of that century, it became acutely apparent in England that colonial juries would not enforce the navigation laws as England desired to see them enforced. This was particularly true in Massachusetts Bay[4] and in other colonies where commercial interests dominated. Hence in 1697, Vice Commissioners of Admiralty were established

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[3] It is particularly important in time of war, when every vessel is in constant use, that *in rem* proceedings be strictly controlled. This is partially done by the Suits in Admiralty Act, 41 Stat. 525, for a brief discussion of which see Clyde Mallory Lines v. The Steamship Eglantine, — U. S. —.

[4] "But the laws of navigation were nowhere disobeyed and contemned so openly as in New England. The people of Massachusetts Bay were from the first disposed to act, as if independent of the mother-country; and having a governor and magistrates of their own choice, it was very difficult to enforce any regulations which came from the English parliament, and were adverse to their colonial interests." Reeves, The Law of Shipping, 56 (1807).

throughout the colonies to enforce the navigation laws of England without jury procedure. It was conceded by the earliest writers that the Vice Admiralty courts in the colonies "obtained in a singular manner a jurisdiction in revenue causes, totally foreign to the original jurisdiction of the admiralty, and unknown to it."[5] Yet, with the great adaptability of the early courts, this jurisdiction in the colonies was fitted into the judicial system so as to allow appeal, as in purely admiralty cases, to the High Court of Admiralty in England. *The Vrouw Dorothea* (1754) reported in *The Fabius*, 2 Robinson 246.[6]

The same conflict which took place in England between Coke as champion of the common law jurisdiction, and the admiralty courts also was carried on in the colonies. Cf. *Talbot v. The Three Brigs*, 1 Dall. 95. As a result there was, throughout the eighteenth century, marked confusion as to the proper jurisdiction of each in forfeiture cases. For example, in 1702, the Board of Trade asked the advice of the Attorney General as to whether all forfeitures in connection with colonial trading matters under the Navigation Act of 1696 were to be prosecuted exclusively in courts of admiralty, and the Attorney General replied in the affirmative.[7] On the other hand it is clear, as the cases cited by the Court show, that this view was not always maintained. One can only conclude that there was in 1789 no completely clear resolution of the conflict between admiralty and common law courts in forfeiture cases, though the cases hereafter considered indicate that the admiralty courts were winning the dominant role. At the same time it must be conceded by the proponents of the Court's view that American practice had come to be markedly different from the English.

It is settled beyond question that the general admiralty law of the United States in 1789 was the law as developed in the colonies and not the law as it came from England. Prior to the middle of the nineteenth century a contrary view was often pressed upon the Court and was as often rejected with adequate

[5] 2 Brown, Civil and Admiralty Law, 2d ed., 491 (1802).

[6] For an account of the development of admiralty jurisdiction in the colonies see 4 Andrews, The Colonial Period of American History, Chap. 8; Root, Relations of Pennsylvania with the British Government, 1696-1765, Chap. 4; the argument made by Daniel Webster as counsel in United States v. Bevans, 3 Wheat. 336, 379, *et seq.*; the Reporter's note to United States v. Wiltberger, 5 Wheat. 76, 113.

[7] 2 Chalmers, Opinions of Eminent Lawyers, 187 (1814); Andrews, *supra*, 169; Webster, *supra*, 3 Wheat at 383.

reference to the differences between the two.[8] The early American courts therefore were faced with the task of determining whether forfeiture actions should be brought exclusively in the common law courts, exclusively in the admiralty courts, or concurrently in either. In repeated decisions relating to forfeitures under federal laws, this Court, within a few years of the adoption of the Judiciary Act of 1789, held that forfeiture jurisdiction was exclusively in the admiralty courts.

The leading case for this proposition is *La Vengeance*, 3 Dallas 297 (1796). In that case the United States brought an action of forfeiture for exporting arms and ammunition. The United States contended in this Court that the action was criminal in its nature and that in any case it was not a civil suit within the admiralty and maritime jurisdiction and therefore should have been tried before a jury as at common law. The Court held that the action was clearly civil since it was an *in rem* proceeding and that it was subject to the maritime jurisdiction because the basic transportation activity involved was "entirely a water transaction." There is no suggestion whatever, in the brief opinion of the Court, of the possibility of a concurrent common law jurisdiction. This rule was followed in *The Sally*, 2 Cranch 406, where the government again contended that it was entitled to try forfeiture actions before a jury since the "cause was of common law, and not of admiralty and maritime jurisdiction," and the same result was reached in *The Samuel*, 1 Wheat 9.[9]

One of the most elaborate arguments ever made in this Court on the issue now before us was presented in 1808 in *The United States* v. *The Schooner Betsey*, 4 Cranch 443. That case arose on an action for forfeiture. Counsel for the claimant, who had also been the losing counsel in *La Vengeance*, contended that the action should have been tried as at common law. He strongly emphasized the Exchequer practice in England and said, "There is nothing in the course of proceedings *in rem* which requires that they should be in a court of admiralty." *Id.* 447. The argument he

[8] See e. g. Manro v. Almeida, 10 Wheat. 473, 489; Waring v. Clarke, 5 How. 441, 454; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 389; and see The Genessee Chief, 12 How. 443.

[9] In The Samuel, the claimant contended that since the action was begun by an information rather than a libel, the case was not subject to the admiralty jurisdiction. The Court held that "Where the cause is of admiralty jurisdiction, and, the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction *to which it otherwise belongs.*" p. 14.

made was almost identical with that which the Court adopts in the instant case. He emphasized particularly that "We have seen that in all cases of seizure for breaches of the law of revenue, trade or navigation, the common law is competent to give a remedy; and consequently this suitor is entitled to it." *Id.* 449.

The Court rejected entirely the argument of the counsel, held *The Betsey* indistinguishable from *La Vengeance*, and interpreted the Judiciary Act to mean that Congress had placed forfeitures "among the civil causes of admiralty and maritime jurisdiction." *The Vengeance* was held conclusive of the proposition that in such cases there could be no right to trial by jury—in other words that under the American law as repeatedly declared between 1796 and 1808, the common law was not, within the meaning of the Judiciary Act, competent to give a remedy in forfeiture cases.[10] When the question of a right to a common law trial in a forfeiture case was certified to the Supreme Court in 1812, the Court found it unnecessary to hear any argument and counsel became so convinced that the authorities were conclusive that he did not press the case.[11]

These cases were reviewed many times in this Court and elsewhere, and cited for the proposition that in the United States, in noteworthy distinction from England, the admiralty forfeiture jurisdiction was exclusive.[12] This culminated in a holding in 1868, *The Eagle*, 8 Wall. 15, 25, 26, that the words in the 1789 Act giving admiralty jurisdiction in forfeiture cases were superfluous and of no effect since "the general jurisdiction in admiralty exists without regard to it."

Against the background of these cases we may consider *Smith v. Maryland*, 18 How. 71, which the Court cites for the existence

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[10] Justice Chase in the course of argument commented from the bench that he thought La Vengeance a well considered case. His comment leaves no doubt that he considered the admiralty jurisdiction for forfeiture exclusive: "The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger if such cases be left to the caprice of juries." p. 446.

[11] Whelan v. United States, 7 Cranch 112.

[12] "This Court decided, as early as 1805 (2 Cranch 405), in the case of the Sally, that the forfeiture of a vessel, under the Act of Congress against the slave-trade, was a case of admiralty and maritime jurisdiction, and not of common law. And so it had done before, in the case of the La Vengeance." Waring v. Clarke, 5 Howard 441, 458. "All the cases thus arising under the revenue and navigation laws were held to be civil causes of admiralty and maritime jurisdiction within the words of the Constitution, and, as such, were properly assigned to the District Court, in the Act of 1789, as part of its admiralty jurisdiction." New Jersey Steam Navigation Co. v. Merchants Bank, 6 Howard 344, 389. And see to the same effect The Margaret, 9 Wheat.

of the forfeiture exception to the general rule as to exclusive admiralty jurisdiction of *in rem* proceedings. In that case the power of the state to protect a fishery by making it unlawful to catch oysters in a certain manner and to inflict a penalty of forfeiture upon a vessel employed in violation of the law was upheld. The entire argument was directed at considerations foreign to the issue of this case and the Judiciary Act was not even mentioned; the opinion of the Court deals almost exclusively with the question of whether the state statute was in conflict with the commerce clause of the Constitution. The Court held in passing that the mere existence of federal admiralty jurisdiction does not per se bar the states from legislating for the protection of its fisheries, a proposition which no one can doubt. It is apparent that the issue now before us, interpretation of the Judiciary Act, was not presented to the Court nor decided by it in the *Smith* case. The Court in the instant case treats *Smith* v. *Maryland* as a holding for a proposition which can flow from it only by accident.

If *Smith* v. *Maryland* accidentally interpreted the Judiciary Act, it did so in a manner in conflict not only with all the cases decided before it in which the issue was squarely considered but with the great number of cases decided since. In *The Moses Taylor*, 4 Wall. 411, 431, (1866) our leading case, the Court declared that "a proceeding *in rem* as used in the admiralty courts, is not a remedy afforded by the common law." The considerations of policy which underlay this interpretation of the Judiciary Act were attributed to Justice Story: "'The admiralty jurisdiction,' says Mr. Justice Story, 'naturally connects itself, on the one hand, with our diplomatic relations and the duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the

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421,427; The Sarah, 8 Wheat. 391, 394; The Belfast, 7 Wall. 624, 638. For acceptance of this view and a criticism of the result see the dissenting opinion in Jackson v. Steamboat Magnolia, 20 Howard 296, 309. It is worthy of note that this opinion by Mr. Justice Daniel makes an argument very similar to that now made by the Court and relies as does the Court on a passage from Kent. The majority of the Court did not accept Daniel's position. Kent himself acknowledged that the view he held was not the law as declared in this Court but he felt that La Vengeance was not "sufficiently considered". 1 Kent's Commentaries, 12th ed., 376. In De Lovio v. Boit, 2 Gallis. 398, 474, Justice Story sitting as a Circuit Judge said: "It has . . . been repeatedly and solemnly held by the Supreme Court, that all seizures under laws of impost, navigation and trade, . . . are causes of admiralty and maritime jurisdiction."

general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home.'" *The Moses Taylor*, *supra*, 430, 431.

The language of *The Moses Taylor* has been repeated so often that I should have thought it to be a truism of the law. In *The Belfast*, 7 Wall. 624, 644: "There is no form of action at common law which, when compared with the proceeding *in rem* in the admiralty, can be regarded as a concurrent remedy." In *Rounds* v. *Cloverport Foundry*, 237 U. S. 303, 306: "The proceeding *in rem* . . . is within the exclusive jurisdiction of admiralty." In *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638, 648: "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself . . . the proceeding is essentially one in admiralty." In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124: "A state may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction."[13]

Cases prior to *Smith* v. *Maryland* explicitly held that forfeitures were not to be enforced by an *in rem* action at common law. Cases since *Smith* v. *Maryland* have repeatedly declared that admiralty's *in rem* jurisdiction is exclusive of state court action. I therefore see no reason for placing any reliance on the *Smith* case which only consequentially affected an issue to which it gave no consideration at all; and for purposes of settling a jurisdictional issue such as this, the English practice, which need give no consideration to the complexities of dual sovereignty and diverse state laws, seems peculiarly inapplicable. By permitting maritime suits against persons in state courts and by denying the state courts jurisdiction of suits against vessels, the right to trial by jury is adequately preserved at the same time that the policy of ultimate exclusive national regulation of ships in commerce is saved.

[13] Additional statements to the same effect are: Hine v. Trevor, 4 Wall. 555, 571; Leon v. Galceran, 11 Wall. 185, 188; Steamboat Co. v. Chase, 16 Wall. 522, 530; The Lottawanna, 20 Wall. 201, 218; Edwards v. Elliott, 21 Wall. 532, 556; Norton v. Switzer, 3 Otto 355, 365; Johnson v. Chicago, etc. Elevator Co., 119 U. S. 388, 397; The J. E. Rumbell, 148 U. S. 1, 12; Moran v. Sturges, 154 U. S. 256, 276; The Glide, 167 U. S. 606, 615; The Robert Parsons, 191 U. S. 17, 37; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 383; Panama R. R. Co. v. Vasquez, 271 U. S. 557, 561.